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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

Miami-Dade County Courthouse
Miami, Florida
Thursday, 2:00 p.m.
June 24, 1999

TRIAL - VOLUME 348

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
CLIFFORD DOUGLAS, ESQ.
On behalf of Plaintiffs

DECHERT PRICE & RHOADS
ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
DOUGLAS CHUMBLEY, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE
RICHARD M. KIRBY, ESQ.
DIANE PULLEY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

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1 APPEARANCES (Continued)

2

DEBEVOISE & PLIMPTON

3 ANNE COHEN, ESQ.

JOSEPH R. MOODHE, ESQ.

4 On behalf of Defendant The Council for Tobacco Research

5 GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL

DAVID L. ROSS, ESQ.

6 On behalf of Defendant Lorillard

7 MARTINEZ & GUTIERREZ

JOSE MARTINEZ, ESQ.

8 On behalf of Defendant Doral Tobacco Corp.
and Tobacco Institute

9

KASOWITZ BENSON TORRES & FRIEDMAN

10 AARON MARKS, ESQ.

NANCY STRAUB, ESQ.

11 On behalf of Defendants Liggett Group
and Brooke Group

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1 (Whereupon, the following proceedings were had:)

2 THE COURT: All right. Have a seat, folks.

3 Who's next?

4 MR. SCHNEIDER: I am, Your Honor.

5 THE COURT: Okay. I guess we need a jury.

6 THE BAILIFF: Bringing in the jury. Jurors
7 entering the courtroom.

8 (The jurors entered the courtroom.)

9 THE COURT: All right. Everybody is here and
10 accounted for.

11 And the next speaker?

12 MR. HEIM: Mr. Schneider now.

13 MR. SCHNEIDER: Good afternoon, ladies and
14 gentlemen. Good afternoon, Your Honor. May it please
15 the Court.

16 Ladies and gentlemen, it's my honor to
17 introduce myself to you directly for the first time.

18 I'm Richard Schneider from King & Spalding in Atlanta.

19 And I, along with Ed Moss, have represented Brown &
20 Williamson and the American Tobacco Company in this
21 case. It's been my privilege to appear before you.

22 Now, if you can remember, it's a long time
23 ago, October 20th, 1998, Mr. Moss made the two opening
24 statements in this case on behalf of the defendants.

25 He's been kind enough to give me the opportunity to

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1 make our closing argument to you here today.

2 Before I begin, I want to add my thanks to
3 you, ladies and gentlemen, as your service as jurors
4 coming here 8 months straight, listening to the
5 evidence. You've impressed us all. I thank you for
6 that, and I thank you for listening to all of us in
7 this case and to me during closing arguments.

8 Now, all of the evidence you've heard thus
9 far really falls into two categories the defendants
10 have summarized. I want to show you that on this
11 board, if I can make it work. And I might fall victim
12 to -- 797. There it is.

13 These two points. Point one: The companies
14 did all that could be done in their response to the
15 health risks associated with smoking. The defendants
16 acted reasonably and responsibly by funding scientific
17 research and doing everything possible to make a less
18 hazardous cigarette.

19 And point two: The risks of smoking are
20 known. Florida smokers at all times have been fully
21 aware of the risks of smoking, as has the public health
22 community.

23 And all of the evidence that I'm going to
24 discuss here today will fall under those two points.
25 And those two points demonstrate that the legal claims

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1 the plaintiffs have made in this case should be
2 rejected.

3 I want to give you a brief preview of point
4 one and point two, and I'll go into them in detail.

5 What the plaintiffs claim in this case is
6 that they took up smoking and its attendant risks, and
7 they were injured and they seek money. In their quest
8 of money, they accuse the defendants of doing nothing
9 to address the risks of smoking; they accuse the
10 companies of negligence.

11 You heard they attack everything. They
12 attack lower-tar cigarettes and claim that smokers, by
13 compensating, offset and defeat the purpose of low-tar
14 cigarettes.

15 And they claim that defendants used ammonia
16 and other techniques to manipulate nicotine to hook
17 smokers.

18 I'm going to address those topics:
19 compensation and ammonia and manipulation, and I hope
20 that I'm going to remind you how the evidence went so
21 very much against the plaintiffs on each of those
22 issues.

23 I'm going to discuss how smokers get a lower
24 delivery when they switch to a lower tar product. I'm
25 going to discuss how nicotine levels went down, not up,

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1 not manipulated up, went down. And I'm going to
2 discuss how plaintiffs' ammonia theory that they
3 heralded so much in their opening statement and
4 mentioned in closing was rejected even by their own
5 witness. And I'm going to show you the testimony on
6 that.

7 And I'm going to add to Ben Reid's remarks
8 when he talked about the efforts of the companies, and
9 I'm going to focus specifically on what Brown &
10 Williamson has done and what American Tobacco Company
11 has done to respond to the smoking and health issue.
12 The plaintiffs are wrong in their claims, ladies and
13 gentlemen, because the evidence shows that the
14 companies did all that could be done.

15 Now, let me preview point two for you: The
16 risks of smoking are known. Beyond their claims of
17 negligence, strict liability, the claims make the
18 inherently incredible claim that they did not know the
19 risks of smoking; that the risks were hidden; they were
20 fooled. And that's the claim: The defendants
21 committed fraud, concealed unknown facts and conspired
22 to keep smokers from knowing the risks. They claim the
23 defendants somehow hid from smokers that it would be
24 somehow difficult to quit. Of course, it's the smoker
25 that's smoking; the smoker that's finding it difficult

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1 to quit, but somehow that was hidden from the smoker.

2 And really, that's the essence of their case: They
3 didn't know the risks.

4 Now, ladies and gentlemen, one of the
5 greatest assets you have in deciding this case is your
6 own common sense. And by common sense we mean your
7 good, old-fashioned ability to tell what makes sense
8 and what doesn't, what's logical and what's not, what
9 people really do and what they don't do.

10 And ask yourselves, ladies and gentlemen, ask
11 yourselves, in light of your experience and common
12 knowledge, in light of your own experience and common
13 sense, and in light of the evidence, wasn't there
14 widespread common knowledge of the risks of smoking
15 before any of us walked into this courtroom? And
16 doesn't that in and of itself prove that the risks were
17 not hidden? Of course it does.

18 And how did the risks become known? Because
19 the companies funded research, because the governments
20 researched this issue extensively, and because the
21 risks were continuously, constantly, widely publicized.

22 So the defendants didn't hide the risks.

23 They couldn't. It would be impossible. You can't hide
24 what's already known.

25 So the fundamental premise of their claim

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1 that they didn't know the risks makes no sense. It's
2 defied by the overwhelming evidence, and I submit it's
3 defied by your own common sense.

4 Now, realizing that they could never convince
5 you that the risks of smoking were not known, what the
6 plaintiffs' claim in this case is that there was some
7 particular facts they didn't know, which was somehow
8 concealed or hidden from the public health community,
9 which plaintiffs claim would have made a difference to
10 them.

11 They assert that we hid the health effects of
12 smoking, and we hid the effects of nicotine, and we hid
13 the very claim that nicotine might be classified as
14 addictive.

15 And even though you heard in this case that
16 there were articles in the public literature for
17 decades and decades and decades, they suggest they
18 never heard of the idea of addiction until 1994.

19 Now, these claims all come under the banner
20 of fraud and concealment and conspiracy, and I'm going
21 to address them under point two.

22 Contrary to the plaintiffs' allegations, the
23 evidence shows, and I'm going to show this to you very
24 directly, that each of the things that they say were
25 hidden was not; it was known to the public health

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1 community, and often as a result of research funded by
2 the defendants or information given by the defendants
3 to the public health community and the government.

4 And the question you're going to be asked on
5 your verdict form, one of the questions you'll be asked
6 is: Did the defendants conceal material information,
7 quote, not otherwise known or available concerning or
8 related to the health effects of nicotine, or this
9 issue of addiction?

10 Hopefully, my discussion here today will show
11 you and the evidence in this case will show you that
12 there is no material piece of information that was not
13 otherwise known and available to the public health
14 community throughout all relevant times in this case.

15 And I'm going to come back to this, but I
16 want to tell you one of the most striking pieces of
17 evidence. You've seen me hold up this battered book.
18 I don't -- it's not me that did all the reading in
19 there, but this is a book entitled Tobacco Experimental
20 and Clinical Studies. You're going to have an excerpt
21 from this book in the jury room with you. It's
22 Defendants' Exhibit 14713.

23 And this book was published in 1961 with
24 tobacco industry funding, and it covers an
25 unbelievable range of topics concerning smoking and

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1 health and nicotine and claims of addiction, every sort
2 of issue on tobacco and health.

3 And if you want to know about the
4 significance of this document, this book, the Larson
5 text -- remember that the 1964 Surgeon General cited
6 this text and said -- remember 1964 they said
7 everything from '59 back had been covered in this text
8 and this is what they relied on. And the Surgeon
9 General relied on this information, published with
10 industry research funds, and on the basis of that
11 information reached his own personal judgment that
12 smoking causes lung cancer in men.

13 That in itself ought to put an end to the
14 allegation that the health effects were hidden, that
15 information about nicotine wasn't known. I'll come
16 back to that in a little bit more detail.

17 I'm going to take another turn at this
18 device, and show you just briefly, that is the table of
19 contents of that text in 1961, Tobacco Experimental and
20 Clinical Studies, published in '61 and supplemented in
21 '68, '71 and '75.

22 It would be difficult for you to see those
23 headings, but you'll have a copy of that exhibit,
24 Defendants' Exhibit 14713, and you can look at the
25 range of things that were discussed in that text:

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1 epidemiology, pH, free nicotine, claims of addiction,
2 calling nicotine an addictive drug; the epidemiological
3 studies in the '50s, all covered in that text.

4 So the scientific facts weren't hidden. And
5 the plaintiffs would have you believe that the
6 defendants controlled all the knowledge there was about
7 smoking and health. But how can they overlook the
8 widespread public knowledge, the mountains of public
9 research, the work by public health scientists, tens of
10 thousands of articles. There were a tremendous number
11 of sources of information. This is the most studied
12 product in history.

13 And most tellingly, in plaintiffs' closing
14 argument over two days, they didn't identify for you a
15 single new or unknown fact that would have changed the
16 science with respect to smoking and health or had any
17 effect on smokers' awareness. What was the fact? What
18 was the fact that you were told was the unknown,
19 undisclosed fact suddenly discovered? Can't be done.
20 And hopefully, my discussion today will show you just
21 how much information was out there.

22 What's unique in this case is that the
23 plaintiffs called witnesses and they made the charge
24 that specific facts, specific information was not
25 known. And while it may be difficult for you ladies

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1 and gentlemen, and it's difficult for me because we've
2 lived very closely to this case, all of us, to remember
3 cross examination of witnesses, showing them the
4 documents, disproving their claim that it wasn't known.
5 Remarkable. I'm going to go through some of that.

6 Now, in addition to their claim that we hid
7 information, they claim that our statements of our
8 opinion on scientific issues caused smokers to be
9 unaware of the risks, but there's no evidence, a lot of
10 argument -- argument is not evidence -- there's no
11 evidence that smokers were kept from being aware of the
12 risks.

13 But I'm going to address our opinions on
14 causation and I'm going to talk about Dr. Sharon Boyse,
15 who you might remember. She was an English scientist.
16 She's Brown & Williamson's director of scientific
17 communications, sort of a small English woman, spoke
18 with a British accent.

19 I'm going to talk about her testimony, what
20 she said about causation, and I'm going to talk about
21 her testimony on whether smokers overestimate the
22 risks. What she indicated is that smokers are so aware
23 of the risks, that they overestimate. They
24 overestimate.

25 Now, I hope that all the evidence that I'll

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1 discuss with you under these two points that have gone
2 away from me -- I'll get them back -- will help you in
3 answering the questions on the verdict form. That's
4 what this process is designed to do.

5 Now, the plaintiffs have the burden of proof.

6 They have the burden of proving what they said in this
7 case, proving what they said in opening statement, and
8 to do that they need evidence, not argument. They need
9 evidence.

10 And evidence is not argument from plaintiffs'
11 counsel, it's not making faces, it's not yelling at
12 witnesses, it's not asking loaded questions. None of
13 that is evidence.

14 And you'll recall that Mr. Moss at the
15 beginning of this case asked you to listen to the
16 opening statements and then test, during the course of
17 the case, whether the statements that were made in
18 opening were in fact borne out by evidence.

19 And what I'm going to discuss with you here
20 today is that the plaintiffs called witnesses who
21 didn't have evidence, whose claims were not backed up
22 by the real facts, and whose claims fell apart on cross
23 examination. And that adds up to plaintiffs not
24 meeting their burden of proof and that's what we ask
25 you to find here today: They have not proven their

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1 claims.

2 Now, with that preview, let me walk to, back
3 to point number one, 671. This is the point:
4 Companies did all that could be done. Mr. Reid has
5 already summarized for you all of the efforts of the
6 companies and all of the technology that they pursued
7 to try to reduce risk, taking all the government
8 suggestions.

9 And you heard plaintiffs' counsel in closing
10 attack and belittle the defendants' efforts and
11 criticize specifically the pursuit of low-tar
12 cigarettes. I think he called them a con and clever.
13 Was that attack fair? Is that what public health
14 scientists were saying about those products?

15 You'll recall that we discussed that topic
16 with plaintiffs' witnesses in this case and showed them
17 what was being said in the public health literature.
18 And I want to start with just a couple of those
19 statements.

20 And the first one comes from Dr. M.A.H.
21 Russell in a 1974 article. Dr. Russell is a renowned
22 medical doctor and a psychiatrist from the addiction
23 research unit at Mobley Hopps Hospital in London.

24 And what did he say? He said this, 1974, in
25 his article: It is unlikely that any single measure

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1 has saved more lives or done more to reduce
2 smoking-related disease than the switch from plain to
3 filter tip cigarettes. That's in 1974.

4 And in 1979, what did Dr. Russell write in an
5 article? 1979. Here's what he wrote: At the risk of
6 being hounded out of the conference, I'm going to
7 suggest that over the past 20 years, the tobacco
8 industry may have achieved more in reducing
9 smoking-related disease than we have. "We" refers to
10 public health community. And this is because they have
11 focused their efforts on making cigarettes safer.

12 That's just two of the many examples of
13 public health statements encouraging the public health
14 efforts. That's an extraordinary statement: At the
15 risk of being hounded out of the conference, I'm going
16 to suggest that over the past 20 years, the tobacco
17 industry may have achieved more in reducing
18 smoking-related disease than we have. This is because
19 they have focused their efforts on making cigarettes
20 safer.

21 I don't think that's a record that would
22 justify calling low-tar cigarettes a con or clever.
23 The companies responded to the public health
24 suggestions, and the public health community viewed
25 their work as legitimate and a persistent quest to find

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1 a potentially less hazardous cigarette.

2 And think about the plaintiffs' allegation or
3 their implication that we did not want a safer
4 cigarette. If we could find a cigarette that we could
5 call safe, it would be good for customers, it would be
6 good for business. And naturally, the companies
7 pursued that topic.

8 Now, I want to spend just a few minutes
9 talking about Brown & Williamson and American and their
10 efforts over the years, their innovations over the
11 years, to respond and address this problem.

12 You heard from a variety of witnesses from
13 Brown & Williamson and American, and I don't know how
14 many witnesses you heard in this case, but I think it's
15 in excess of 60 probably -- and so it's got to be
16 difficult for you to remember any of them, any
17 particular one. And that's one of the benefits of
18 making this closing argument, to remind you of key
19 evidence.

20 But you'll recall Dr. Boyse, who I mentioned,
21 and Dr. Michael Dixon from BATCO. I don't know if you
22 might remember Dr. Dixon. He's the gentleman that came
23 from England. He was raised in Nottingham, Robin Hood
24 country.

25 And you might remember that Mr. Rosenblatt

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1 and Dr. Dixon had a little fun, and Mr. Rosenblatt was
2 asking Dr. Dixon: Who was the most famous actor to
3 play Robin Hood? And Dr. Dixon said, much to
4 Mr. Rosenblatt's surprise, Kevin Costner. Not Errol
5 Flynn, Kevin Costner. And hopefully that will bring
6 Dr. Dixon back to mind for you.

7 Contrary to the plaintiffs' allegations that
8 you didn't have any evidence from the CEOs, you heard
9 Mr. Sandefur's deposition. He was the CEO at the time
10 the case was filed. He since died. You have our
11 current president, CEO, Mr. Brookes, who you saw by
12 video. And you saw Mr. Johnson from the American
13 Tobacco Company. There were way more than enough
14 witnesses in this case, ladies and gentlemen.

15 Now, both Brown & Williamson and American
16 made two types of responses to smoking and health
17 issues. First of all, they funded external research,
18 and second of all, they did internal research to try to
19 modify their products.

20 And you heard Mr. Reid talk about that
21 generally. I'm going to give you a few specifics about
22 Brown & Williamson. I'm going to talk about some of
23 the research they funded and how those companies did
24 what they said they would do in The Frank Statement.

25 But let's cover product development first.

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1 Dr. Boyse was on the stand for a couple of days and
2 explained at length the efforts that Brown & Williamson
3 and American pursued to modify their products and
4 invent new designs and new alternative technologies.

5 They used the state of the art techniques
6 that Mr. Reid summarized for you, and as a result of
7 them, what happened? One more time. 376. Tar and
8 nicotine levels dropped like a rock. And the
9 reductions began in 1952 with Brown & Williamson's
10 introduction of the first cellulose acetate filter.
11 That's still the filter that's being used today,
12 introduced in 1952.

13 And American also was a leader in innovation
14 with ventilation technology, and they came out with
15 Carlton. You may remember I showed you the Carlton
16 packs.

17 Carlton came out in 1964. At that time the
18 average tar and nicotine delivery, tar was 24
19 milligrams. And Carlton came out 1964, 7 milligrams.

20 Well, as you probably remember, Carlton
21 today, regular Carlton, is one milligram. And I don't
22 know if you'll recall Carlton Ultra, which has a
23 delivery that is the lowest tar and nicotine delivery
24 on the market. And it is lower, lower than any public
25 health official has suggested a cigarette be made at.

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1 You may recall B&W's Capri product, very slim
2 cigarette, slimest cigarette on the market. By being
3 slim, it uses less tobacco; therefore, it delivers less
4 smoke.

5 And over time, Brown & Williamson has made an
6 entire range of products. I'd like to get you to 361.
7 You may remember this board showing the various types
8 of products: full flavor, lights, ultras. And notice
9 they cover an entire tar spectrum from .01, which is
10 Carlton Ultra, to 24, Lucky Strike, still way lower
11 than what it was in the 1950s. An entire range of
12 nicotine.

13 And here's a very significant point. When
14 these cigarettes are advertised, their tar and nicotine
15 figures are set forth in the advertisements.

16 And so it's known and has been known for more
17 than 30 years that the companies offer products with
18 different tar and nicotine deliveries. The suggestion
19 in this case has been: That's been a surprise, a
20 secret, who knew that? It's advertised. And we offer
21 a range of products for smokers to select and choose.

22 Now, in addition to lowering tar and
23 nicotine, and contrary to the plaintiffs' allegations
24 in the case, Brown & Williamson funded an entire range
25 of bioassay research, biological testing, taking the

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1 latest tests of the day, mouse skin painting, Ames
2 testing, inhalation; and testing various designs:
3 filter, no filter, Burley tobacco versus Bright
4 tobacco. See what the smoke generated from those tests
5 does in the various biological tests, see if there's
6 changes that could be made. And what was the bottom
7 line? You'd get conflicting results. And external
8 scientists did the same tests and got the same results.
9 And what was the bottom line recommendation? You
10 heard: Should I try it one more time? No.

11 438. Bottom line recommendation was the
12 Tobacco Working Group, and pretty much every other
13 regulatory authority that looked at this, specifically
14 concluded that the best way to carry forward was on the
15 general reduction strategy, that is, to continue to
16 reduce tar deliveries in one form or another.

17 And Dr. Boyse told you about B&W's biological
18 research in the United States, how she was not aware of
19 any agreement that prevented B&W from conducting that
20 research, or American.

21 And she also testified, Dr. Appleton did as
22 well, about the company's work with respect to
23 additives, reviewing that and making sure that the
24 additives used by the company don't increase the
25 hazards of smoking.

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1 Now, in addition to this sort of additional
2 approach to lowering tar, offering a range of products,
3 you heard in this case about alternative technologies.
4 Is there a product we can make that could be an
5 alternative to the traditional, conventional cigarette?

6 And Brown & Williamson funded, and its
7 affiliate in England, BATCO, is one of the leaders in
8 thinking about this kind of technology. And if you
9 look in the documents that you'll have with you, you
10 look at Defendants' Exhibit 37124. It worked. That's
11 a patent for an idea called Aerial.

12 And what was Aerial? It was going to be a
13 product that heated rather than burned tobacco. Well,
14 it was ahead of its time. It was in the 1960s.
15 Ultimately, RJ Reynolds, Philip Morris were able to
16 come up with technology to heat tobacco rather than
17 burn, and created Premier, created Accord.

18 Brown & Williamson itself has pursued a
19 product idea, an experiment called Airbus, but it's all
20 been part of this effort to try to explore alternative
21 technologies and do whatever can be done.

22 And this technology wasn't hidden. It's very
23 interesting. This is a patent -- and you can take a
24 look at it in the jury room -- that says: It's been
25 alleged that tar is the problem. We're trying to come

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1 up with some ways to address that. Here's an idea.

2 Maybe we'll create less tar by heating tobacco.

3 And they put it in a patent for everybody to
4 read. Not hidden.

5 Now, that short summary, you could go into
6 more detail, and you may remember that Dr. Boyse was
7 here for hours discussing Brown & Williamson and
8 American's work in terms of products over the years.

9 But that little summary, that provides a fair
10 historical context for you to judge whether this
11 company was doing all that can be done, whether it was
12 pursuing the state of the art techniques of the day,
13 trying to be inventive, trying to be creative, trying
14 to make products that may potentially be less
15 hazardous. And that's context.

16 Now, by contrast, the plaintiffs have tried
17 to take isolated documents to portray the companies
18 unfairly, and indeed often to portray the documents
19 themselves unfairly.

20 And during closing argument, I'm sure you saw
21 a number of documents that you never heard of in the
22 case before. But there was one document that you had
23 heard of before and was discussed with Dr. Dixon.
24 That's Plaintiffs' Exhibit 3276.

25 You may recall that was a document with a

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1 line in it about bags of money. You remember
2 Mr. Rosenblatt said he wasn't going to tell you where
3 that document came from or what person wrote it; and
4 there's a reason for that, and that's because that
5 document wasn't written by Brown & Williamson or
6 American or even seen by those companies. It was
7 written by an employee at BATCO, British American
8 Tobacco Company, which is not even a defendant in this
9 case.

10 But you might recall Dr. Dixon is an employee
11 from BATCO, and we had him over here to testify based
12 on his expertise in compensation. And Mr. Rosenblatt
13 had a chance to ask him about that document.

14 And go ahead and look at it and see if you
15 remember this. That document contains in it the word
16 "rubbish." And Mr. Rosenblatt asked Dr. Dixon:
17 Dr. Dixon, does the word "rubbish" in England mean the
18 same thing that the word "rubbish" means in America?

19 And he said: Oh, yes, it does. Rubbish
20 means rubbish.

21 And what he said, after looking at that
22 document and being asked questions about it, was that
23 that document was rubbish. And he went down and spoke
24 to the author of that document, Mr. Greene, and told
25 him that he didn't know what he was talking about; that

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1 he was proposing an idea that nobody accepted, that
2 nobody acted on. And that's a document that's offered
3 to you as context to judge the companies.

4 Now, ladies and gentlemen, Brown & Williamson
5 and American have been in business for more than 100
6 years, and you've heard this from each defendant.

7 We've got thousands upon thousands of employees writing
8 documents. The companies aren't perfect and their
9 documents aren't perfect.

10 And by 1995, for example, Brown &
11 Williamson -- and Dr. Boyse testified about this -- had
12 millions, millions of pages of documents. You know,
13 you heard these allegations about documents that say in
14 them: Throw this out, destroy, discard. It's ironic
15 that they're reading the document. They have it in
16 their hand when they're reading it to you, and millions
17 of pages of documents were retained by our clients and
18 by the other defendants in this case, and those
19 documents have been gone through, and in any of those
20 millions of pages has anybody found a new fact that
21 would have changed public discussion on smoking and
22 health?

23 Did any of those documents constitute a
24 public statement by Brown & Williamson or American that
25 the plaintiffs proved was false and proved that the

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1 person who wrote it believed it was false? No.

2 Have they found in those documents any new
3 idea about how to make cigarettes that's not been
4 publicly discussed? No.

5 Have they found any truly new science? No.

6 Have any unknown risks been uncovered?
7 Absolutely not.

8 So what is it with these documents? What is
9 it? It is an effort to try to create something out of
10 nothing. It's an effort to suggest that new
11 information has been discovered, when it hasn't. And
12 it is an effort to ignore what these companies have
13 done.

14 And you can look at the documents, ladies and
15 gentlemen, and some of them are great, some of them are
16 great documents. Some of them are good documents, and
17 some of them are rubbish. But they don't provide the
18 context for you, ladies and gentlemen, to judge these
19 companies.

20 The context for judging these companies is
21 their 40-year history of action that you have heard
22 from the various witnesses in this trial, in the trial
23 of this case.

24 Now, I'm going to turn now to the more
25 technical portion of my presentation and talk about

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1 some of the issues that the plaintiffs claim were
2 concealed or claim constituted manipulation.

3 I'm going to talk about those issues and I'll
4 begin with the FTC method. The plaintiffs' attack on
5 low-tar cigarettes really fell into two categories:
6 They don't like the FTC method because they don't think
7 it predicts what a smoker gets, which it doesn't, and
8 it was never intended to do; and they don't like
9 low-tar cigarettes because of the issue of
10 compensation.

11 Now, you remember compensation was when
12 somebody was smoking a higher tar cigarette and
13 switched down to a lower tar cigarette, they might take
14 bigger puffs or adjust their smoking pattern. That's
15 compensation.

16 And the plaintiffs say all of the information
17 on that was hidden by the tobacco companies, unknown to
18 the public health community.

19 Now, a lot of witnesses addressed these
20 issues, but the chief accuser was Dr. Michael Siegel
21 from Boston. He was a witness with a lot of opinions
22 and no information to back them up. He testified on
23 November 5 and November 6th.

24 Now, plaintiffs presented Dr. Siegel to you
25 as a key witness who would allegedly tell you what the

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1 tobacco companies knew that the public health community
2 didn't know. And Dr. Siegel made a whole string of
3 allegations of what the public health community
4 supposedly didn't know.

5 So you're going to hear me mention him and
6 his testimony a good bit in my presentation today,
7 because the plaintiffs tried to have him carry a whole
8 lot of water on their claims of fraud and concealment.

9 And as the evidence showed time and time
10 again, there were a lot of holes in his water bucket.

11 Now, Dr. Siegel graduated from medical school
12 in 1990. He doesn't maintain a license to practice
13 medicine. He's basically an antismoking activist. He
14 spent a lot of time in college and since as an activist
15 on smoking issues. He's a board member of the
16 Americans for Nonsmokers Rights. And he couldn't bring
17 himself to admit to us that that was an antismoking
18 group. I had to remind him that he had admitted that
19 at his deposition.

20 But now, he's an earnest fellow. He is
21 entitled to campaign against smoking. He is a bright
22 fellow, a dedicated public health advocate, and he's
23 entitled to campaign against smoking. But what he's
24 not entitled to do is come into the courtroom and make
25 claims against these companies that aren't true.

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1 Now, Dr. Siegel told you that the public
2 health community didn't realize that the FTC machine
3 was not intended to guarantee precisely what a smoker
4 would get, didn't know anything about compensation
5 until the '80s.

6 But he was wrong. Let me turn to the FTC
7 test first. You recall the FTC test method. It was a
8 machine; took certain puffs on a cigarette to generate
9 tar and nicotine figure.

10 And what the test was designed to do was to
11 rank cigarettes. If you had two cigarettes, one that
12 was 10 milligrams of tar, one 9 milligrams, you smoked
13 them through a machine in the same way, you'd get 10
14 milligrams in the first cigarette, 9 in the other.
15 Helps you to rank the cigarettes.

16 That's valuable information because it tells
17 you that between two cigarettes that you might buy, a
18 15-milligram cigarette and a 5-milligram cigarette, if
19 you smoke them both in the same way, the 5-milligram
20 cigarette is going to have less delivery than the 15.
21 That's what the FTC tells you.

22 Does that mean it tells you precisely how
23 much tar and nicotine that a smoker will receive? No.
24 A smoker may smoke a 15-milligram tar cigarette and
25 receive less than 15 milligrams; may receive more, may

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1 receive the same.

2 It was like EPA gas mileage ratings, to give
3 you something to compare. And the FTC required it and
4 we're obligated to the FTC to put it on our
5 advertisements. You've seen it. 478. And then --
6 excuse me, 699. And here's an example of a figure in
7 an advertisement: 16 milligrams tar, 1.2 milligrams
8 nicotine, average per cigarette by FTC method. That's
9 what's in the advertisements.

10 Now, the plaintiffs say that it was hidden
11 from the public health community that the machine
12 method might get a different delivery than a smoker.
13 And is that true? Well, I asked Dr. Siegel about that.
14 First let me show you what's in evidence as Defendants'
15 Exhibit 23558.

16 372, please.

17 That is a letter from American Tobacco
18 Company, Brown & Williamson, Liggett and Myers, Philip
19 Morris, RJ Reynolds to the FTC in 1966.

20 And if you give me 686, please.

21 That's a blow-up of it, and look what it says
22 there: Whatever procedures are adopted by the
23 commission, the results will apply only to that
24 particular set of test conditions and will not
25 necessarily indicate relative smoke yields to any

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1 particular smoker, in view of the wide variety of
2 smoking patterns followed by individual smokers.

3 That's in a letter from the industry, from
4 these companies, to the FTC. So was it hidden
5 information? No.

6 And when the FTC adopted the method, they
7 issued a press release.

8 If you could go to 687.

9 And what did that press release say? It
10 says: In determining the testing method, the
11 commission has not attempted to gauge the test to the
12 amount of smoke or tar and nicotine which the average
13 smokers would draw from any particular cigarette. No
14 two human smokers smoke in the same way, no individual
15 smoker always smokes in the same fashion, et cetera.

16 In other words, precisely recognizing that
17 this was a test to rank cigarettes and not to guarantee
18 what particular smokers would get.

19 And that's what was announced to the public.
20 So from the very beginning, the FTC understood that it
21 was a way of ranking cigarettes; that smokers smoked
22 differently. And it wasn't hidden; it was known and it
23 was set forth.

24 So Dr. Siegel was wrong about that
25 allegation, that the public health community didn't

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1 know anything about that. And why was he wrong?
2 Because he just hadn't checked what the public health
3 community knew on this topic before he came here to
4 testify.

5 Now, let's turn to compensation. I just
6 explained to you, I reminded you again of what
7 compensation is: Some smokers switch, and when they
8 first switch, adjusting their smoking behavior. The
9 plaintiffs' claim that because of compensation, it
10 totally offsets the benefit of switching to a lower tar
11 cigarette.

12 First of all, there are many smokers who
13 start with a low-tar cigarette, so this whole issue of
14 compensation doesn't even apply to them.

15 But second, the evidence shows that switchers
16 from high tar to low tar do, in fact, get a lower
17 delivery, because compensation is only partial. And
18 Dr. Dixon came and testified to you about that.

19 370.

20 And you may remember this board. And here's
21 a comparison of a 15-milligram cigarette and a
22 5-milligram cigarette; a switcher going from 15 to 5.
23 Here's the smoker smoking 15 milligrams, and this is
24 the actual human intake. When that smoker switches to
25 a 5-milligram cigarette, would you expect a decrease of

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1 10 milligrams? If he smoked the cigarette precisely
2 the same, that's what you would get.

3 But some smokers, when they switch, take
4 bigger puffs. They adjust their smoking and they get
5 something in the middle for some period of time, and
6 that's called partial compensation.

7 And why does that happen? Why is it that
8 when a smoker switches from a high-tar cigarette to a
9 low-tar cigarette they take bigger puffs? And the
10 plaintiffs would have you believe that smokers are
11 nicotine-driven robots with things happening in the
12 deep recesses of their brain driving them to do this.

13 But Dr. Dixon came and explained it, and
14 basically what it has to do with is mouthfeel and aroma
15 and a sense of smoke in the mouth. And higher tar
16 cigarettes, Dr. Dixon explained, have a certain flavor,
17 mouthfeel, different than lower tar cigarettes.

18 Now, milk and cigarettes are not alike; I'm
19 not saying that they are. But to get a hold of this
20 concept, remember the issue with respect to switching
21 from whole milk to skim milk? Used to drinking whole
22 milk, switch down to skim milk. Doesn't taste like
23 milk at all, has a whole different feel, feels like
24 water. But eventually you get used to it. Now you
25 can't go back to the whole milk.

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1 Well, the same thing with respect to high-tar
2 and low-tar cigarettes. When you first switch down to
3 low-tar cigarettes, it's an adjustment, change in
4 mouthfeel, and the smoker takes a bigger puff. But
5 after a while, they adjust to it; they get used to it.

6 And so this allegation of compensation just
7 doesn't stand up, because what happens is that smokers
8 only partially compensate in the first place, 40
9 percent, the evidence shows, but as they get 60 percent
10 of the reduction. And after a while, they adjust and
11 switch to their normal smoking pattern.

12 But, ladies and gentlemen, there's another
13 aspect of compensation that I want to discuss with you,
14 and that is Dr. Siegel's allegation that this whole
15 topic that I've just discussed with you was hidden from
16 the public health community by the tobacco companies.
17 You remember Dr. Siegel's allegation. He said the
18 public health community didn't know anything about it
19 until the 1980s, because it was hidden by the tobacco
20 companies.

21 Let me address that issue. First of all, we
22 showed Dr. Siegel an article in 1968. And each one of
23 these, if your memory is great, you'll remember this
24 was like on November 5 and 6 of 1998. And 439, 1968
25 article. This was published by Dr. Armitage in the

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1 Journal of Nature in 1968, and it says: It's worth
2 noting that someone smoking a cigarette has fingertip
3 control of how much nicotine he takes into his mouth.
4 Fingertip control. That was 1968. Had Dr. Siegel seen
5 it? Nope.

6 Let me take a look now at 440. This is an
7 article, 1970, written by Dr. Heather Ashton. Again,
8 what's interesting and unique was these articles were
9 funded by the industry. What does this one say?
10 Comparing smokers that switch: The results are
11 compatible with the possibility that smokers
12 automatically adjust the nicotine dose obtained from a
13 cigarette to some optimum level which may vary with
14 different activities.

15 Talking about adjustment. Well, had
16 Dr. Siegel seen that? No.

17 How about Defendants' Exhibit 15567? And
18 you'll have an excerpt from this in the jury room, but
19 it really just takes the cake, ladies and gentlemen.
20 Here's this book called Smoking Behavior, published in
21 1978. You'll have an excerpt; you can look at it.
22 Defendants' Exhibit 15567. And this has articles in
23 it, chapters in it written by people from the tobacco
24 industry talking about this very subject of
25 compensation that I just discussed with you.

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1 And in fact, take a look at 441. And this is
2 a quote from this text in 1978 published by the
3 industry: It's often assumed by smokers and implied by
4 others that it's preferable to change to a brand which
5 offers lower deliveries of tar and nicotine, and to an
6 increasing extent such advice is becoming more
7 explicit.

8 And it goes on. Next paragraph: However,
9 there is a considerable body of evidence that shows
10 that smokers alter their smoking patterns when they
11 change to a brand of cigarettes with different delivery
12 characteristics.

13 And remember the allegation, the theory --
14 I'll come back to it in a minute -- was that the reason
15 people were compensating was that they were used to a
16 higher level of nicotine, and they wanted to smoke
17 their lower tar cigarette to get their level of
18 nicotine they were used to.

19 That was the theory. Dr. Siegel said it was
20 a hidden theory; the tobacco company hid it.

21 It was published in this book: If a smoker
22 of relatively high delivery cigarette changes to a
23 brand with substantially lower deliveries, he may
24 actually increase his intake of tar and carbon monoxide
25 in his attempts to compensate for the reduced delivery

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1 of nicotine.

2 Had Dr. Siegel seen this before he came here
3 and told you the public health community didn't know
4 anything until the '80s, because tobacco companies,
5 tobacco scientists, never told them? No, he hadn't
6 seen it. He just hadn't seen it.

7 Now, he also wasn't familiar with a 1983
8 document from the Third Report of the Independent
9 Scientific Committee on Smoking and Health. I think
10 this is the crowning touch. Let me ask you to take a
11 look at 442. 442.

12 This is the Third Report of the Independent
13 Scientific Committee. And I've underlined that first
14 line: The industry has told us, however, that the
15 level of nicotine in some cigarettes has already
16 reached a point where consumers are trying to maintain
17 their nicotine intake by methods of compensation.

18 These include increases in puffing, depth of
19 inhalation, cigarette compensation and changing brands.

20 The industry has told us. This is the
21 Independent Scientific Committee on Smoking and Health,
22 which is akin in England to the Office of Smoking and
23 Health here in the United States.

24 So compensation is partial. It doesn't last,
25 short term. But do you have to only take Dr. Dixon's

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1 word on that issue that people adjust and get used to
2 it? The plaintiffs' star witness in the case, Dr. Neal
3 Benowitz, what did he have to say about this issue?

4 Show me 443.

5 This is Dr. Benowitz in a 1994 article. I
6 showed this to Dr. Siegel. Dr. Siegel had said:
7 Compensation, terrible; totally offsets the benefits of
8 low tar.

9 I said: Dr. Siegel, have you ever seen this
10 article by Dr. Benowitz? Look what it says.

11 Over-compensation, i.e., inhaling more smoke from
12 low-nicotine cigarettes than from higher tar brands,
13 appears, however, to persist only for days or weeks.
14 In long-term studies of carbon monoxide exposure, after
15 subject switched to low-yield cigarettes, compensatory
16 over-smoking appears not to persist. Dr. Benowitz.

17 Had Dr. Siegel seen that document? No.

18 Again, he had not.

19 And what about the theory -- what about the
20 theory that it was nicotine that's driving
21 compensation? Well, Dr. Dixon came and talked to you
22 about that and told you that that was tested. What
23 they did was they took cigarettes, kept the nicotine
24 level the same, and lowered the tar levels and had the
25 high-tar smoker switch. What happened?

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1 When the nicotine levels were kept the same
2 and the tar was lowered, the smoker still engaged in
3 additional puffs, bigger puffs, indicating that it's
4 something about the tar, not the nicotine, that's
5 causing the bigger puff. That's exactly what Dr. Dixon
6 told us. It's a taste mouthfeel. You get used to the
7 high-tar cigarette, switch down, you adjust. And
8 that's all there is to compensation.

9 Now, obviously, nicotine plays a role.
10 Remember Dr. Dixon told us that the nonnicotine
11 components of smoke add flavor, mouthfeel, and the
12 nicotine is instrumental in giving the catch in the
13 back of the throat. Talked about a balance.

14 He gave us an analogy. He said it's like
15 Coca-Cola. If you drink Coca-Cola that's flat, it just
16 doesn't taste like Coca-Cola; it needs the bubbles and
17 the sensation to feel like Coca-Cola. Same thing with
18 tar and nicotine. Got to be in balance. That's what
19 Dr. Dixon told us.

20 So these allegations about FTC and
21 compensation just didn't stand up, nor did the
22 plaintiffs' allegations about low-tar ads. The
23 companies print the FTC numbers in their ads pursuant
24 to their obligation to the FTC; and not a single
25 witness came in here and told you that the numbers that

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1 we have printed are not correct numbers, that weren't
2 the results.

3 And nothing in the ads say that these
4 cigarettes are guaranteed to be safer. In fact, they
5 all bear the same warning: These cigarettes cause
6 cancer.

7 Now, the public health community has
8 recognized that lower tar was potentially less
9 hazardous. Public health scientists have been saying
10 for decades that less tar is better, and it makes sense
11 and agreed, and we pursued that alternative. It made a
12 whole bunch of products available. We properly
13 produced them and we properly advertised them.

14 Now, let me turn to the allegation that the
15 companies manipulated nicotine. Various witnesses, and
16 again Dr. Siegel is chief among them, chief accuser,
17 said that the companies manipulated nicotine to addict
18 smokers so they couldn't quit.

19 And the implication of that allegation is
20 that nicotine was increased. It was increased. That
21 allegation fell flat on its face. You all know so much
22 about nicotine now that it hardly bears to remind you,
23 of course, nicotine occurs naturally in tobacco. And
24 since the 1950s -- and you have that board over there
25 against the wall. You see that tar and nicotine levels

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1 on average went down; they didn't go up. They weren't
2 manipulated up. They went down. There was no spiking.

3 You heard Mr. Heim talk to you about
4 Dr. Uydess and his statements on spiking. There's no
5 evidence of any such activity in commercial products.
6 And the companies can and do offer products at a
7 variety of nicotine levels, but that's not manipulation
8 to addict people. Offering and advertising a range of
9 products for smokers to choose doesn't fit this
10 sinister allegation of manipulation.

11 As I said before, the varying nicotine levels
12 are not secret; they're advertised. And the companies,
13 they test their products and they blend them to be sure
14 that they meet whatever FTC number is put on the
15 package.

16 But, again, that's not manipulation to addict
17 people. Plaintiffs would have you believe that all
18 smokers smoke one brand of cigarettes, one nicotine
19 level, and they're hopelessly hooked and they can't
20 change.

21 But the facts are, there are hundreds of
22 types of brands. Smokers smoke light, full, ultra. In
23 fact, there's a denicotinized brand that you heard
24 talked about, the Next cigarette.

25 When you peel away the plaintiffs'

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1 allegations of manipulation, you'll find that they were
2 way overplayed in this case and fundamentally unfair.

3 We talk about manipulation meaning increase,
4 but then we asked Dr. Benowitz: What does manipulation
5 mean to you? Could it mean lowering?

6 He said: Yes, it means lowering.

7 Well, lowering nicotine, lowering delivery,
8 is a good thing. How can that fit the plaintiffs'
9 label of manipulation?

10 What you find is, what the plaintiffs pointed
11 to to support their claims, consists of documents in
12 the companies exploring ways not to addict people, but
13 to the contrary, to find a less hazardous cigarette.

14 You heard Mr. Ross talk a little bit about
15 the concept of a low-tar, medium-nicotine cigarette.

16 And I'm going to show you a couple of excerpts from the
17 1981 Surgeon General Report on that topic.

18 But before I do, I just want to remind you
19 that the theory was that tar was the culprit, get
20 people to lower their tar. Well, some people who are
21 smoking higher tar cigarettes were not switching to low
22 tar. And the theory was: Well, if you kept nicotine,
23 didn't lower it as much, maybe you can get more people
24 to switch over to lower tar cigarettes. That was
25 thetheory of less hazardous cigarette.

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1 How do you do that? The companies
2 experimented with lowering nicotine, then adding back
3 some or trying to use high-nicotine tobaccos. But the
4 evidence shows that these were experiments that never
5 got beyond the test phase, the test stage, because what
6 you created were cigarettes that were out of balance.
7 You didn't have the proper balance between tar and
8 nicotine. The tar and nicotine ratio wasn't in
9 balance.

10 And are these just ideas that came from the
11 tobacco companies? No. Take a look with me at the
12 1981 Surgeon General's Report. I want to let you look
13 at two things. First of all, look at 668. You'll have
14 this excerpt with you in the jury room as well.

15 Let me show you two things about this
16 document. This first is a commentary on lower yield
17 products. Most of these persons have changed to lower
18 yield cigarettes. This is the Surgeon General in 1964,
19 in the expectation that this will somehow reduce the
20 hazards of their smoking: It's in the interest of
21 these persons and in the public interest to know to
22 what extent these expectations are justified. In this
23 1981 report, 1981, the Public Health Service has
24 reviewed the questions again and in far greater depth
25 than before. Overall, our judgment is unchanged from

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1 that of 1966 and 1979. Smokers who are unwilling or as
2 yet unable to quit are well advised to switch to
3 cigarettes yielding less tar and nicotine, provided
4 they do not increase their smoking or change their
5 smoking in other ways.

6 And did this report in 1981 talk about this
7 issue of a low-tar, medium-nicotine cigarette? It did.

8 Go to 669.

9 Look at this. And remember, they're pointing
10 you to documents where the tobacco companies are
11 evaluating whether you can lower tar, not lower
12 nicotine as much, experimenting with that. And the
13 plaintiffs are calling that manipulation. This is the
14 Surgeon General. This is the 1981 Surgeon General.
15 Dr. Julius Richmond was the Surgeon General.

16 Here's what's said: It is necessary to
17 evaluate cigarettes with lower tar-to-nicotine ratios
18 than are currently found in the marketplace.

19 Compensation by smokers of lower tar and nicotine
20 cigarettes appears to be based on nicotine delivery.

21 The tar-to-nicotine ratio might limit the delivery of
22 smoke constituents to the smoker; a low ratio might be
23 a desirable strategy for lower risk cigarettes.

24 Next paragraph: By smoking more to
25 compensate for lower nicotine intake, lower tar and

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1 nicotine cigarette smokers can inadvertently increase
2 their exposure to tar and carbon monoxide beyond what
3 might be expected from a less intensively-smoked tar
4 and nicotine cigarette.

5 Look at this next sentence: Because less
6 hazardous cigarettes may require the delivery of
7 moderate levels of nicotine while delivering lower
8 levels of tar and carbon monoxide, russell -- remember
9 Dr. Russell who we started with -- Russell has proposed
10 that lower tar-to-nicotine ratios should be used to
11 indicate less hazardous cigarettes.

12 That is the Dr. Russell who I read to you
13 from the beginning that said he was going to be run out
14 of a conference because he was going to suggest that
15 for the last 20 years the industry has done more than
16 the public health community because it's tried to make
17 cigarettes safer.

18 This was such a technique that was explored
19 and they couldn't do it. You heard Mr. Ross tell you
20 about the Lorillard program. Couldn't be done.

21 Now, ladies and gentlemen, even Dr. Siegel
22 admitted that efforts by the companies to pursue these
23 types of goals could not be called manipulation. And
24 when you look at the documents, that's what they're all
25 connected to this type of effort, to make lower tar

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1 cigarettes more attractive.

2 There's no evidence that nicotine was
3 manipulated to make smokers unable to quit. Smokers
4 are able to quit. 50 million Americans have quit
5 smoking. Now, in a world where nicotine levels are
6 dropping, smokers are quitting in droves. It is truly
7 unfair to be accused of manipulating nicotine,
8 jacking the nicotine up and making people unable to
9 quit.

10 And one of the unfairest allegations in this
11 case concerns a tobacco called Y-1. And again, calling
12 upon your powers of memory reserve, back on October
13 19th, 1998, when this journey we were on was in its
14 infancy -- we hardly knew it would last to be 8 months
15 old -- on October the 19th, when Mr. Rosenblatt made
16 his opening, he called Y-1 a super-duper secret
17 tobacco, and he suggested that it was used improperly
18 and secretly.

19 And they didn't call you one witness, not
20 one, not one witness to testify about it. B&W called
21 Dr. Boyse and she delivered the facts. And when you
22 hear the facts, you can't believe the allegation has
23 been made. Y-1 was not a secret tobacco. It was
24 invented by the government, by the United States
25 Department of Agriculture.

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1 They took a high-nicotine tobacco that had
2 poor taste, they cross-bred it with a low-nicotine
3 tobacco that had a better taste, trying to make a good
4 tasting high-nicotine tobacco. Why? So they could do
5 this: So that they could try to make a less hazardous,
6 low-tar, medium-nicotine product. And that's what Y-1
7 was.

8 The government eventually gave seeds to Brown
9 & Williamson. Brown & Williamson tried to make the
10 tobacco commercially useful, agriculturally useful.

11 And in fact, Brown & Williamson -- and you'll
12 have these documents. 471. You'll have these
13 documents with you. This is Defendants' Exhibit 15045
14 and 15046.

15 And what is it? It's a patent filed in 1991.
16 They might lead you to believe that Y-1 was an issue
17 around forever and ever. 1991, B&W is trying to patent
18 their improvements to Y-1. And in these documents --
19 and take a look at them; they're publicly filed -- they
20 call the tobacco high-nicotine tobacco.

21 B&W made an attempt to use Y-1 to make a
22 low-tar, medium-nicotine cigarette, just like
23 Lorillard, just like RJR. It failed; couldn't make it
24 work. It was out of balance. It wasn't acceptable.

25 So that's it on Y-1. It wasn't secret. The

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1 government invented it. The government gave the seeds
2 to Brown & Williamson to try to make a less hazardous
3 product. And that's the accusation that's made in this
4 case.

5 That's an unfair allegation, and it's got no
6 substance. And that's why the plaintiffs didn't call
7 you one witness on the topic and didn't put on any
8 proof that any smoker in Florida was ever affected by
9 Y-1 in any way.

10 Now, Your Honor --

11 THE COURT: Yes, sir.

12 MR. SCHNEIDER: -- we've been going about an
13 hour.

14 THE COURT: It's up to you.

15 MR. SCHNEIDER: I'm fine. If you're fine,
16 we'll continue on.

17 THE COURT: You're entitled to a 15-minute
18 break in the afternoon. If you want to do it now,
19 that's fine.

20 MR. HEIM: Go for another 15 minutes.

21 THE COURT: We've been voted down, folks.

22 Unless you all want a break.

23 MR. MOSS: What does the jury want?

24 MR. SCHNEIDER: Continue.

25 THE COURT: All right. Let's pr i.

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1 MR. SCHNEIDER: Let's turn to ammonia,
2 because this is another empty allegation. You might
3 remember in opening statement there was the theory, and
4 Mr. Rosenblatt repeated yesterday, and when you hear
5 what I'm going to say about it, ask yourself: How
6 could this be repeated again?

7 But here's the theory: Ammonia is used to
8 increase pH, is used to increase free nicotine, so that
9 free nicotine can reach the brain faster. And that's
10 called the bioavailability theory or the absorption
11 theory.

12 And I'm going to talk about those concepts of
13 ammonia and pH and free nicotine in a little bit more
14 detail, but that's the allegation: Ammonia used to
15 increase pH, increases free nicotine, reaches the brain
16 faster. That's the allegation.

17 Well, eight days into the case, eight days
18 into the case, a star witness is on the stand,
19 Dr. Benowitz. We asked him, and here is the testimony,
20 Exhibit 445: Now, the theory -- this is Dr. Benowitz
21 being cross examined by me, I believe: Now, the theory
22 that changes in pH level could affect bioavailability,
23 that's something that you discussed here today,
24 correct?

25 Yes.

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1 And is it correct, based upon your knowledge,
2 that that theory has not been scientifically proven?
3 Correct?

4 Answer: Well, we need to talk specifically
5 about what's meant by bioavailability. If you mean
6 affecting the absorption rate.

7 Because that's the allegation, of course,
8 what do I say? That's what I mean.

9 Answer: That's correct.

10 Now, Dr. Siegel came to the courtroom and he
11 said ammonia is used to increase pH, to increase free
12 nicotine, to increase the speed to the brain.

13 And I said: Well, Dr. Siegel, who has more
14 knowledge on that topic, Dr. Benowitz or you?

15 And he said: Dr. Benowitz.

16 And here's what Dr. Benowitz had to say about
17 that theory. (Indicating)

18 So the theory was rejected by their very own
19 witness. But they kept repeating it. They repeated it
20 yesterday. Or I guess on Monday and Tuesday.

21 So we called witnesses to address it head on.
22 You remember Dr. Townsend and Dr. Dixon and
23 Mr. Burley -- Burnley, excuse me. Burley is a type of
24 tobacco. Burnley was a witness.

25 But we called them as witnesses. What did

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1 the evidence show? First of all, what was the
2 plaintiffs' evidence? What did they tell you on Monday
3 and Tuesday? You want to know about ammonia and pH?
4 They gave you a list of document numbers, a list of
5 document numbers. Go and look at it, because all the
6 testimony is against them. They say look at these
7 documents. All the testimony goes against their
8 theory.

9 Their own witness went against their theory.
10 Ammonia is found in very small amounts in tobacco. And
11 ammonia compounds have been used to help make
12 reconstituted tobacco. It helps bind tobacco parts
13 together. And it turns out that when ammonia compounds
14 are present, they release sugars and add a flavor note.

15 And you know what's intriguing? It's got a
16 name. It's called a maliard reaction. It occurs in
17 breads and cookies. And what else did Dr. Burnley tell
18 us about it? Bread, cookies. There was one other. I
19 can't remember.

20 But when ammonia, teeny, teeny amounts, mixes
21 with and releases sugar, it gives a roasty-toasty
22 flavor.

23 What the companies found in the 1970s is
24 Marlboro had this great taste, this great flavor note.
25 And they analyzed it and found out that Marlboro was

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1 using ammoniated reconstituted tobacco in small amounts
2 in their cigarettes.

3 And they tried to mimic that, tried to figure
4 that out. And you look in the documents, the ammonia
5 documents that he cited, and you will see that there's
6 discussion of the effect of ammonia on flavor. And the
7 other thing it did was reduce harshness, made the smoke
8 less harsh.

9 Now, there's another aspect to ammonia, and
10 I'm only going to touch on this briefly, and that
11 relates to pH. And what is pH? PH is a scale; tells
12 you whether something is acid, like orange juice, or a
13 base, like ammonia.

14 And as it turns out, well, how does that
15 relate to tobacco? Well, tobacco smoke has a pH. And
16 what significance is that? Well, it's long been known
17 and published in the Larson text and elsewhere that
18 nicotine, the form of nicotine, is dependent upon the
19 pH of the smoke that it's in.

20 There's two forms of nicotine that are
21 pertinent: One is bound, bound hydrogen; and one is
22 free. And when pH is very acidic, there's very little
23 free nicotine; and when it's basic, there's more free
24 nicotine. And all that is known and was published.

25 And from all of that science, a theory arose

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1 that, as the plaintiffs were alleging, that you might
2 be able to use ammonia to affect pH, to effect free
3 nicotine, but not to increase it to the brain, but to
4 try to get sensations in the mouth, in the throat,
5 impact. The term "impact" was used. And all the
6 witnesses testified that meant the catch you feel in
7 the back of the throat when you inhale the cigarette.

8 Now, what's interesting is Dr. Siegel said
9 all these concepts were unknown, never heard of them.
10 Of course, they're in the Larson text, they're in the
11 1979 Surgeon General's Report.

12 Show 468, please.

13 This is a chart that shows pH versus
14 protonated versus free nicotine in the '79 Surgeon
15 General Report. Discussing this pH and free nicotine.

16 And in connection with trying to develop less
17 hazardous cigarettes in the public health community, a
18 theory arose that you might be able to use less
19 nicotine, and maybe by adjusting pH, get the same
20 impact, get the same balance. And that was a theory
21 that was discussed in the Journal of the National
22 Cancer Institute in 1972.

23 Let me ask you to take a look at 446. This
24 is Dr. Siegel again. Dr. Siegel said this would never
25 have been heard of, never been in the press, never been

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1 in the public health literature, nobody knew anything
2 about it.

3 I asked him: And the theory is that if you
4 add an alkaline substance, you might be able to raise
5 the pH and have an effect on nicotine, correct?

6 That's exactly the theory, and he goes on.

7 And is it a theory discussed in this article
8 in the Journal of the National Cancer Institute in 1972
9 as a method of pursuing a safer cigarette or less
10 hazardous cigarette? Correct?

11 Answer: That's correct.

12 So that's not an article you reviewed before
13 you came here today and gave your opinions, correct?

14 Answer: I had not seen this article, but,
15 again, he says, it is right.

16 It happened again. He hadn't seen an article
17 about an issue in the public health community that he
18 came to tell you about.

19 Now, Dr. Benowitz also had written and made
20 statements at conferences about this issue. Let me ask
21 you to take a look at 367.

22 This is Dr. Benowitz reading from an article,
23 a statement he made at a conference: The higher the
24 pH, the more nicotine impact there would be on the
25 throat. Throat. One would experience more irritation,

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1 more of a nicotine-type sensation. I don't think that
2 differences in pH would make much of a difference in
3 bioavailability, although it would impact on how strong
4 the cigarette tasted.

5 Do you see that, Doctor? I asked Dr. Siegel.

6 Yes, I see it.

7 Have you reviewed that prior to coming into
8 court today?

9 No. No. I just came to accuse the companies
10 of knowing information that was not known by the public
11 health community, of having a theory with respect to
12 ammonia that increased the speed, but I had not looked
13 at what had been said in the public health literature.

14 So that was a theory, but what happened in
15 actual practice? What happened in actual practice is
16 that the amount of ammonia technology, the ammonia
17 compound, is so tiny that it has no effect on actual
18 pH.

19 And the witnesses in this case testified to
20 that: Dr. Townsend, Dr. Appleton, Dr. Dixon,
21 Mr. Burnley, and so did Dr. Benowitz. They made this
22 great allegation, so Dr. Benowitz was asked: Have you
23 seen any evidence of that?

24 Let me take you to 447.

25 This is Mr. Heim asking Dr. Benowitz. And I

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1 want to just go to the third sentence there -- well,
2 let me read you the whole question: I'm going to come
3 to that part of what you talked about yesterday. But I
4 want to stay with what we know in terms of evidence and
5 facts that support charges and theory. And my question
6 to you doctor is, simply, you have not seen any
7 imperical evidence, any fact factual data that shows
8 that the ammonia used by Philip Morris in making its
9 commercial cigarettes has any effect on the pH of
10 smoke?

11 Answer: Dr. Benowitz, that's correct.
12 So you had a theory and in practical
13 application, ammonia did not increase pH. And in
14 addition, all the witnesses agree that spoke about it,
15 had knowledge, Dr. Benowitz, Dr. Dixon that free
16 nicotine that gets absorbed in the throat, doesn't get
17 to the brain faster; it gets there slower. Bound
18 nicotine goes into the lungs, gets into the brain
19 faster. That's why Dr. Benowitz said bioavailability,
20 absorption rate wasn't increased.

21 And finally, ladies and gentlemen, there is
22 no evidence that there's any correlation between
23 ammonia and sales. If that was the case, all products
24 would use ammonia. They don't.

25 You heard Dr. Dixon say that BATCO's products

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1 don't use it, Kool cigarettes, 1960s, '70s, never used
2 any ammonia. No correlation between pH and sales.

3 And you may recall this chart that you saw
4 with Dr. Townsend, 798, in which shows the pH varying
5 over time as the blends vary up and down between 6 and
6 6.3; which, by the way, now that we're all pH experts,
7 is acid, 0 to 7 is acid, 7 is water, above 7 is base.
8 And the acid range, remember what I said, acid, acidic,
9 very low free nicotine. Sales going down, pH of the
10 blend moving up and down. No correlation.

11 So in the end, as Shakespeare said: A lot of
12 sound and fury signifying nothing.

13 Now, ladies and gentlemen, plaintiffs'
14 allegation about cigarette design, about manipulation,
15 fell apart in this case. The evidence shows that the
16 companies responded to smoking and health issues. They
17 pursued every possible technique to lower tar. They
18 pursued novel devices, and they did exactly what you
19 would expect a company to do with a product with known
20 risks: They tried to find ways to lower the risks and
21 give consumers a choice.

22 You heard the plaintiffs suggest in this case
23 that companies didn't live up to their
24 responsibilities, but we did. What are our
25 responsibilities? The plaintiffs argued that because

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1 some smokers develop disease, it's our responsibility
2 to get out of business; we need to shut down. But
3 that's wrong.

4 Our government has decided that people are
5 aware of the risks, are warned of the risks, and have
6 the right to smoke. But what is the responsibility of
7 the company? The responsibility of the company is to
8 fund research, to make potentially less hazardous
9 cigarettes available, to put the government warnings on
10 the package, and to continue research, and to try to
11 find the key, try to find the mechanism that one day is
12 going to enable you to make a cigarette that everybody
13 can say is safe. Pursue that every day. That's our
14 responsibility. And that's what we have done.

15 Now, I'm going to turn to my second point.

16 But I think I'll give us all a short break, if you
17 don't mind.

18 THE COURT: All right. We'll take our break
19 now.

20 (The jurors exited the courtroom.)

21 THE COURT: All right. We'll be in recess.

22 (A 15-minute recess was taken.)

23 THE COURT: All right. Let's get the jury
24 out, please.

25 THE BAILIFF: Bringing in the jury. Jurors

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1 entering the courtroom.

2 (The jurors entered the courtroom.)

3 THE COURT: All right, all present and
4 accounted for. Have your seats. You may proceed, sir.

5 MR. SCHNEIDER: All right.

6 THE COURT: Before you do, we may be working
7 a little later tonight. 5:30ish, if that doesn't
8 bother anybody.

9 JUROR: I have a class.

10 THE COURT: When?

11 JUROR: 6:00.

12 THE COURT: All right. One juror has class
13 at 6:00. See what we can do about it. Thank you,
14 ma'am.

15 MR. SCHNEIDER: Ladies and gentlemen, now I'm
16 going to move to point two, the risks, that the risks
17 were known. Florida smokers at all times have been
18 fully aware of the risks of smoking, and that screen is
19 supposed to say, but it doesn't, as has the public
20 health community.

21 Now, I told you at the outset, the
22 plaintiffs' claim that they didn't know the risks of
23 smoking, and in addition to that claim, the plaintiffs
24 and the witnesses alleged that the defendants
25 monopolized, hid the whole concept of addiction.

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1 They claim that we hid this information and
2 did nothing to assist the public health community in
3 compiling it, and nothing could be further from the
4 truth.

5 First of all, you heard Mr. Moodhe yesterday
6 talk to you about research that CTR funded, an enormous
7 volume of published literature. And that's what was
8 done to live up to what was said in The Frank
9 Statement.

10 But that's only the tip of the iceberg in
11 terms of what is out there, and the huge volume of
12 information publicly available.

13 The government and public health scientists
14 in the United States and across the world have
15 continuously researched cigarettes and health effects
16 for more than 50 years.

17 And you heard about the Tobacco Working Group
18 program, a 10-year program studying cigarettes. You
19 recall that Dr. Boyse testified that cigarettes are the
20 most studied consumer product in history. There were
21 6,000 articles in 1964, and 30,000 in 1979, and 57,000
22 in 1989.

23 But the funding of research predicated 1964.
24 You recall that Dr. Boyse talked to you about the
25 Medical College of Virginia. And specifically you'll

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1 have with you in the jury room -- 374, please -- a set
2 of exhibits, they run from 14573 through 14580. And
3 they're a set of reports, recent biological research
4 reports funded by the American Tobacco Company from
5 1950 to 1971.

6 You'll have this in the jury room with you,
7 and hopefully you can see some of these things on the
8 table of contents from one of these reports. But this
9 is a document published by American, made available in
10 1950, '51, '52, all the way through 1970s.

11 Look at the titles: Cigarette Smoke
12 Irritation; Toxicology of Nicotine; Fate of Nicotine in
13 the Body; Cardiovascular Effects of Nicotine; Factors
14 Controlling Membrane Penetrability of Nicotine; Role of
15 Nicotine in the Cigarette Habit, and so on.

16 Hidden concepts? Hidden information? Hidden
17 issues? You can look at those pamphlets when you're
18 back in the jury room.

19 And I showed you earlier, and I believe
20 Mr. Heim spoke about this yesterday. 675. This is
21 again the Larson text. Ladies and gentlemen, you'll
22 have the excerpt from it, and I spoke to you about it
23 before and how the Surgeon General relied upon it.
24 With this text, you can look down the table of
25 contents. It has information about the effects of

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1 nicotine on the brain, the medulla; talks about
2 chemicals in tobacco smoke; the epidemiology; fate of
3 nicotine in the body. Got an entire chapter, Chapter
4 15, on the tobacco habit.

5 And I'm going to show you some of the pages
6 from that. This text covers every conceivable issue
7 concerning smoking and health from 1961. It summarizes
8 6,000 articles published by scientists, funded by the
9 industry.

10 And you know, you heard yesterday that the
11 concept that nicotine could be classified as a drug was
12 a big secret. You had to get these documents from the
13 tobacco companies to find this out. You had to have
14 this case in 1994 to find that out.

15 Well, here is this text: Tobacco
16 Experimental and Clinical Studies, Larson, Haag and
17 Silvette. You open the book, Page 1. There they are.
18 Professor of pharmacology, P.S. Larson; Haag, professor
19 of pharmacology; Silvette, visiting professor of
20 pharmacology.

21 And what is pharmacology? Pharmacology deals
22 with the study of drugs on the body, study of effects
23 of substances on the body. And this is a text being
24 published. That wasn't a hidden concept.

25 Now, you heard Mr. Rosenblatt during cross

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1 examination belittle the text, saying nobody reads it,
2 just scientists. Well, first of all, he's wrong. The
3 Surgeon General read it and relied on it, as I talked
4 to you about.

5 And how can they claim that information was
6 hidden? How can they claim this information was hidden
7 when you put it between the covers of a book and it's
8 relied upon by the Surgeon General, the very Surgeon
9 General who concludes in his opinion smoking causes
10 lung cancer in 1964?

11 But Dr. Siegel said that we hid the health
12 effects. And you would have thought that before you
13 come to Miami, and you make the allegation that the
14 information is hidden and the public health community
15 doesn't know it and the tobacco companies had the
16 information and didn't provide it, what would you have
17 done? A side-by-side comparison: Here is what the
18 tobacco companies knew, here is what the public health
19 community knew, and you'd be able to show me. Show me
20 the document that has in it the hidden information, the
21 unknown information.

22 And did Dr. Siegel do that? No. And you
23 remember, I asked him. I said: Dr. Siegel, you said
24 that we hid the health effects. I've shown you this
25 avalanche of material. Tell me, what is the document?

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1 Where is the document that has in it hidden, unknown
2 information.

3 And he said he wasn't able to identify a
4 single one.

5 Now, when you're making serious charges
6 against a company like that, against these companies,
7 against any companies, against any people, you ought to
8 be able to support your claims.

9 But he could not. And it's startling. He
10 came to tell us what the public health community knew
11 and didn't know, and he hadn't even seen this book. He
12 hadn't seen it, and in the first couple of pages in the
13 '64 Surgeon General Report referenced as a key
14 reference source.

15 Now, you have the task of judging
16 credibility. But when you have a witness who comes to
17 tell you about what the public health community knows,
18 and was as unfamiliar with what was in the public
19 health literature as this witness, you make a judgment
20 of credibility.

21 I've shown you the screen -- and by the way,
22 I messed up because I was calling out these little
23 numbers on the page, but the actual exhibit number is
24 what is on the top of the page. So if I put these up
25 here, look at the exhibit number. This is DX 14713.

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1 But when a witness comes into this courtroom,
2 you would expect him to be able to back up his charge,
3 and this witness could not. In light of the
4 overwhelming mass of information, you can't claim that
5 the tobacco companies hid the health effects. And
6 suffice it to say, they weren't able to point out to
7 you a single, unknown, the new fact, the missing
8 science.

9 Now, I want to turn to another area of
10 supposedly hidden unknown information. And this
11 relates to the effects of nicotine and the issue of
12 addiction.

13 Now, when you came to this courtroom and
14 heard evidence for the first time here about nicotine
15 and addiction, the plaintiffs were suggesting that this
16 whole issue was like a giant surprise. It popped up
17 out of nowhere in 1994.

18 But nicotine was first identified in the
19 1800s, discussed in that book. It occurs naturally in
20 tobacco and has long been believed to be one of the
21 reasons people smoke, one of the factors. And as a
22 result of that, as you would expect, people have
23 studied it up, down, sideways and backwards.

24 And the literature has included articles
25 studying how nicotine reacts with the body, how it's

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1 metabolized. Hundreds of articles on that.

2 A chapter on absorption and fate of nicotine
3 in the body. You heard Mr. Rosenblatt say yesterday:
4 Well, nicotine has an effect on the receptors.

5 That was discovered in 1905, 1905 and
6 published in the public literature. And you may
7 remember Dr. Larry Carr from the University of
8 Louisville. Take a look at Defendants' Exhibit 15723.
9 It's a very nice summary of the history of nicotine
10 research, published nicotine research. Hidden
11 information? Hidden facts? I don't think so.

12 Now, ladies and gentlemen, in addition to the
13 Larson text, there's many, many, many other things that
14 have been published. I'll show you a few examples.
15 All of this argument and all of the points I'm
16 discussing here today address this whole allegation of
17 concealment. Question 4B on the verdict form.

18 Mr. Reid talked to you about 4A. It can't be fraud to
19 state your opinion. It can't be fraud to use the same
20 words public health scientists are using. It can't be
21 fraud for the defendants to use the words that
22 Dr. Whelan, the plaintiffs' witness, use from the
23 stand.

24 And I'm dealing with 4B. You can't say it's
25 hidden when it's not. That's the bottom line. That is

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1 the bottom line.

2 Now, let me show you this, 665. I'm not
3 going to use this anymore.

4 This is a book called Smoking Behavior,
5 Motives and Incentives, 1973. Defendants' Exhibit
6 3286.

7 Take a look at 663. This is written by
8 William Dunn from Philip Morris. It's a book put
9 together by him and published in 1973. And this is
10 just an arrangement of the cover page and some of the
11 table of contents. And look at some of these table of
12 contents titles.

13 Show me 664.

14 1973, 26 years before Dr. Siegel came to the
15 courtroom: Neuropsychopharmacology of nicotine and
16 tobacco smoking; further observations on nicotine as
17 the reinforcing agent in smoking; nicotine related
18 neurochemical changes; additional characteristic EEG
19 differences between smokers and nonsmokers.

20 Remember all of that that Dr. Gullotta from
21 PM studied EEG. Big secret was claimed. Published in
22 this text. Effects of pH on nicotine absorption from
23 the mouth.

24 The effects of nicotine were not hidden; the
25 topic of nicotine was not hidden. The public health

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1 authorities knew all about it, based on information
2 from their own research, their own excellent research,
3 their own excellent scientists and from information
4 provided to them by scientists funded by industry.

5 So what about this issue of addiction,
6 smoking behavior; was that a hidden fact? That smokers
7 would keep to their habit over time? That some would
8 find it difficult to quit? That they'd smoke
9 repeatedly? Was that hidden? Anybody observing a
10 smoker could see that throughout history.

11 And what would you expect? You would expect
12 some people to say: You know, when I observe smoking
13 behavior, looks to me like it's a habit. People are
14 enjoying it; that's why they're doing it. They do it
15 habitually, and like any habit you enjoy, it's
16 difficult to give up for some.

17 Others, other scientists may say: No. You
18 know, it's an addiction. We should call that an
19 addiction. Well, was that concept, was that debate
20 hidden, only known to the tobacco industry?

21 Ladies and gentlemen, again, the Larson text.
22 I'm going to show you a few things from it. This is
23 published in 1961, available before the Surgeon General
24 published his results in 1964. And remember what the
25 Surgeon General said in '64. He said, it's difficult

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1 for some people to quit smoking. Make no mistake about
2 it, I'm not saying the habit should be easily broken,
3 but I don't think it should be called an addiction,
4 because it's not like hard drugs. That's what the
5 Surgeon General said in 1964.

6 In making that decision, he had all of what
7 I'm about to show you available to him in this book
8 published with industry funding. Again, this is
9 Defendants' Exhibit 14713. 472. This is page 526 of
10 the text. I've highlighted the portions.

11 Let me take you to 693. And this shows you
12 the blow-up of this. In this book, Tobacco
13 Habituation, the terms "habituation" and "addiction,"
14 were still used more or less indiscriminately by many
15 writers.

16 So in 1961 or the '60s, if someone was using
17 the word "addiction" or "habit," they were using it
18 interchangeably; didn't mean anything in particular at
19 the time.

20 Look at also on Page 526, 691. This is in
21 this text. In this text. I can find it for you, Page
22 526: That smoking produces a craving far more when an
23 attempt is made to give it up is undoubtedly, wrote H.
24 Raulerson in 1926, 1926. But it can seldom be
25 accurately described as overpowering. And to regard

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1 tobacco as a drug of addiction may all be very well in
2 a humorous sense, but it's hardly accurate.

3 Next sentence: J.D. Rolleston, 1937, was
4 inclined to regard smoking as an addiction. He
5 disagrees.

6 Let's take a look at 692.

7 Remember yesterday you heard the concept of
8 drug addiction, that tobacco could be a drug addiction.
9 Unheard of, never before passed the lips of man until
10 the documents were produced in this case. 1961,
11 comparing the tobacco habit to drug addiction. In this
12 text, Page 526.

13 Take a look at Page 527 of this text, and
14 it's in your excerpt that you'll have, 695.

15 It is important to recognize these
16 fundamental differences between addiction, morphine and
17 habit. Tobacco, if the nature and meaning of drug
18 addiction are to be correctly understood. L.M. Johnson
19 maintains the directly contrary view that tobacco
20 smoking was not a habit, but a drug addiction. Hidden
21 concept? Published in this book, provided to the
22 Surgeon General, and said here. You reach your
23 decision based on what's out there. Based on these
24 concepts.

25 Take a look at 694. Same book. Smoking has

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1 been termed a disease, L.M. Johnson, who considered
2 that any drug addiction was a disease.

3 So, ladies and gentlemen, the evidence is
4 simply beyond dispute that the effects of nicotine, the
5 concept of addiction, was all out in the public
6 literature in the 1960s through information funded by
7 the industry.

8 Let me take you to Exhibit, actually
9 Dr. Seevers' 1962 article, 464. In this, Dr. Seevers
10 ultimately writes the Surgeon General Report in 1964 on
11 addiction.

12 And look what he says in this article,
13 published in 1962, published in the Journal of the
14 American Medical Association: Experts in the field of
15 drug abuse have attempted to preserve the so-called
16 scientific meaning of the terms "habituation" and
17 "addiction" by redefining them and enlarging their
18 scope, in the hope they could serve the needs, not only
19 of science and medicine, but also of law and sociology.

20 As a long-time student of this problem who
21 must assume his share of responsibility for
22 contributing to the present confusion, it becomes
23 increasingly apparent to me that these terms are beyond
24 salvage with the scientific description of drug effects
25 and should be abandoned.

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1 The words are being used interchangeably.
2 You don't know in this time period if someone is using
3 the word "addiction," do they really mean "habit"; if
4 they use "habit," do they really mean "addiction."

5 The situation in regard to the use of tobacco
6 contributing further to the confusion. The term,
7 quote, "cigarette addict," is common among layman,
8 1962, cigarette addict common among layman, and the
9 term "addiction" is applied to the abuses of tobacco,
10 alcohol, narcotics, without discrimination by many in
11 the medical profession, especially since cigarette
12 smoking has become a cause celeb in certain medical
13 groups.

14 Now, in 1964, when Dr. Seevers wrote the
15 Surgeon General's Report, he looked at the known facts:
16 Smoking is reinforcing properties, smokers smoke
17 repeatedly, smokers have difficulty quitting, smokers
18 find that they stick to their habit.

19 And he looked at those facts and he compared
20 them to morphine and hard drugs and said, addiction,
21 scientifically, the word "addiction" ought to be
22 applied to the hard drugs, things that are
23 intoxicating, that have severe withdrawal effects; and
24 smoking, to distinguish it from those substances, we
25 should call it a habit. That's what he decided.

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1 Based on information known and available, not
2 hidden information in any way, shape or form. And the
3 Surgeon General in 1964 didn't say it's a habit,
4 because he thought people could quit.

5 465.

6 This is from the 1964 Surgeon General Report:
7 Thus correctly designating the chronic use of tobacco
8 as habituation rather than addiction carries with it no
9 implication that the habit may be easily broken, or be
10 broken easily.

11 So Dr. Siegel comes to court and he says all
12 this was hidden, never heard of the concept of
13 addiction, drug addiction, new concept, new revelation.
14 And each of these documents that I showed him he had
15 not looked at before. He had seen the Surgeon General
16 Report of ours, but the Seevers article he had not seen
17 and these pages from the Larson text he had not seen
18 when he made those charges.

19 But even Dr. Siegel had to admit, after
20 showing him this, that there were various articles
21 claiming that nicotine and smoking was addictive.

22 If you look at 466:

23 And you are aware, are you not, from reading
24 the literature in the '50s and '60s, that there were
25 various medical articles claiming that nicotine and

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1 smoking was addictive, and others saying it was a
2 habituation. That was published in the literature in
3 the '50s and '60s. You know that, correct?

4 Correct.

5 And it's been known for decades and decades
6 that some people find it difficult to quit; isn't that
7 correct?

8 That's correct.

9 So this is one of the prime examples, and you
10 may remember the exchange with Dr. Siegel. I said:
11 Dr. Siegel, don't you think that a reasonable person
12 could say that cigarettes are not like heroin and
13 cocaine? Don't you think a reasonable person walking
14 around in society could say that?

15 And he said: Yes. I think they could say
16 that, because the tobacco companies have influenced
17 them and caused them to think that nicotine is like
18 chocolate and caffeine. That's the only reason they
19 would say that.

20 I would submit to you that in 1964, the
21 Surgeon General made a very reasonable decision. You
22 can't compare cigarettes to hard drugs. Dr. Siegel's
23 suggestion that nobody could contend otherwise is as
24 valid as all of his claims that the public health
25 community didn't know what he said they didn't know.

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1 Totally invalid.

2 Now, yesterday, the plaintiffs showed you a
3 memorandum, Exhibit 796, written by Addison Yeaman.

4 You may remember it. He told you: Read that document.

5 Mr. Yeaman was a brilliant lawyer. That's what he told
6 you.

7 Now, the first thing I need to tell you about
8 that document, as written in 1963, is that
9 Mr. Rosenblatt made a major mistake when he read you
10 that document. I think he just misread it, but you may
11 recall he was talking about this document. He was
12 talking about Mr. Yeaman, and what he said was -- he
13 was talking about Yeaman, quote -- this is from
14 Mr. Rosenblatt's closing, and then he goes on to say:
15 Well, you know, cigarettes have certain unattractive
16 side effects. They cause or predispose to lung cancer.
17 And he's saying this in 1963. That's what
18 Mr. Rosenblatt read to you.

19 Well, he made a mistake, because he was
20 reading this paragraph, this paragraph numbered 1 of
21 Exhibit 796, but it's preceded by a sentence with a
22 colon. And here's what it actually says: But
23 cigarettes, dash, we will assume the Surgeon General's
24 committee to say, dash, we will assume the Surgeon
25 General's committee to say, despite the beneficent

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1 effect of nicotine, have certain side effects.
2 Wasn't Mr. Yeaman saying this: He was hypothesizing
3 what the Surgeon General would say.

4 That's a mistake in reading. But
5 Mr. Rosenblatt did read to you some portions of the
6 document accurately, particularly he read the portions
7 where Mr. Yeaman uses the phrase, nicotine an addictive
8 drug.

9 1963.

10 First of all, we've seen 1961, 1962 text and
11 articles using that terminology, saying it's used
12 loosely, saying that layman commonly call cigarettes
13 addictive. But the plaintiffs say, because Mr. Yeaman
14 used that word in 1963 in that document, that proves
15 nicotine is addictive, and we knew it in '63.

16 But is there any new science about nicotine
17 addiction in this document? Is there any new science
18 not disclosed in the '61 Larson text?

19 What the plaintiffs didn't do is they didn't
20 provide you with any context for this memorandum. But
21 Dr. Boyse did, and I'm going to remind you of it. The
22 document is entitled Implications of Battelle Hippo I
23 and II.

24 What is Battelle Hippo? Maybe you remember,
25 but Hippo refers to the hypothalamus, part of the brain

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1 that controls body function and hormones. And Sir
2 Charles Ellis of the British American Tobacco Company
3 was convinced that nicotine was beneficial to mankind.

4 And he wanted to do some research to prove
5 the benefits of nicotine, and he was going to then
6 trumpet that. He commissioned an organization called
7 Battelle Institute in Geneva, Switzerland to do some
8 research. And they did it and he thought it showed the
9 benefits of nicotine.

10 Now, he subsequently provided it to two
11 scientists in England to review before he could trumpet
12 it to see if it was good research, prove the benefits
13 of nicotine. That's in evidence, 15456.

14 15456, take a look at it. It says that this
15 research is poorly performed and unpublishable. It was
16 not novel. Dr. Boyse, Dr. Dixon talked about it. It
17 doesn't have anything in it about the intoxicating
18 effects or severe withdrawal effects or anything like
19 that. It just talks about the role of nicotine in
20 stress reduction and appetite.

21 And you can go back in the table of contents
22 and those topics are discussed in the Larson text.

23 But how was it then that Mr. Yeaman was using
24 the term "addictive drug" in this memorandum? Well, he
25 had received -- and you can look at this in evidence.

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1 It's Exhibit 3383. This is a letter from Sir Charles
2 Ellis that describes the Battelle Hippo research.

3 And 732. I want to blow up that paragraph.

4 Here is what Sir Charles Ellis writes to
5 Addison Yeaman, that Addison Yeaman has before him when
6 he wrote this memo. Here comes the hidden research:
7 For people who oppose smoking do so on the grounds that
8 it is an important contributory cause of lung cancer,
9 and that it is just a habit with nothing to be said for
10 it other than that it is pleasureable. Once given up,
11 it would soon be forgotten.

12 It is my opinion -- and he's writing this in
13 1963 -- it is my opinion that the results I have
14 described show this view to be untenable. Nicotine is
15 a wonderfully beneficent drug which does not, like
16 morphine, sleeping pills or even Dexedrin, lead to a
17 cumulative addiction, people keep to their smoking
18 habits over years. If nicotine were not known, its
19 discovery would be claimed as one of the great medical
20 advances of the day.

21 This is what Sir Charles Ellis was writing
22 about. He believed he could prove nicotine had great
23 benefits to mankind. This is the research that
24 Mr. Yeaman is discussing in this memorandum.

25 This is hidden, hidden science that reflects

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1 badly on the industry?

2 And look at this. He uses the term, in the
3 same sentence, or the same two sentences: Nicotine is
4 a wonderfully beneficent drug that does not lead to
5 cumulative addiction. People keep to their smoking
6 habit over years.

7 Habit and addiction within 10 words of each
8 other.

9 Now, ladies and gentlemen, after hearing
10 that, after knowing that it doesn't say anything about
11 intoxication and withdrawal, doesn't relate to the '64
12 Surgeon General's Report at all, you may reach the
13 conclusion that this wouldn't have had any effect on
14 the Surgeon General's opinion whatsoever.

15 In fact, you'll find that there's a letter in
16 evidence where citations were sent to the Surgeon
17 General with some of the same topics covered by Hippo.

18 But based upon that information that I've
19 just provided to you, you may conclude that has got
20 nothing at all to do with what the Surgeon General was
21 saying in 1964.

22 That wouldn't have changed his view. He
23 wasn't saying it's intoxicating, he wasn't saying it's
24 associated with intoxicating effects. He says it's a
25 wonderfully beneficent drug.

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1 Well, if you made that conclusion, you
2 wouldn't be alone. You wouldn't be alone, because
3 Dr. Benowitz was asked whether he had reviewed the
4 internal company literature, the internal company
5 memoranda, and to identify any that he thought would
6 have affected the Surgeon General's Report in 1964.

7 And he said he wasn't aware of any. He had
8 reviewed the Yeaman memo, he had reviewed the Hippo
9 research, and he is the nicotine expert. And he said
10 he did not identify this as changing, would have any
11 impact at all.

12 Now, ladies and gentlemen, Mr. Yeaman has
13 this document before him. He uses the word
14 "addiction," and the plaintiffs say: That's it. That
15 means it's proven. New science. You used the word
16 "addiction."

17 That just will not withstand analysis. There
18 is nothing in that document, nothing that the
19 plaintiffs have shown you to say that Mr. Yeaman was
20 saying anything other than that smoking was a
21 pleasurable habit that people keep to over the years;
22 or using the word "addiction" loosely, he wasn't saying
23 it's like cocaine and heroin, and he wasn't saying
24 people can't quit. And he wasn't saying anything that
25 hadn't already been said in the public literature.

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1 So on question 4B, concealed facts, no way.
2 No way. You heard the mountain of awareness. Well,
3 this is the mountain of information. It was out there.
4 It was published. It was discussed. It was funded by
5 the industry, and the witness they called to tell you
6 that it wasn't did not have his facts straight.

7 Now, let me turn to a different question, the
8 question of opinions on causation. Plaintiffs said
9 that the defendants' statements fooled and prevented
10 smokers from knowing the risks; our statements over
11 time fooled the smokers.

12 Yet, the testimony shows that the risks of
13 smoking are common knowledge and have been for decades.
14 And you heard Dr. Ford's testimony that the tobacco
15 industry wasn't listened to in its views in expressing
16 its opinions.

17 But the plaintiffs say they were fooled.
18 They argued: We were fooled. We didn't know the risk.

19 But that's his argument; it's not evidence.
20 They didn't introduce a single survey where smokers
21 were asked, "Are you aware of the risk of smoking?"
22 where they said no.

23 And the Gallup Polls and all of the other
24 testimony from Dr. Ford, that Mr. Heim will go over
25 with you, showed that the proof of awareness was

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1 conclusive, 95 percent awareness.

2 Now, like anybody faced with a risk, anybody
3 faced with a risk, each smoker is going to hope it
4 won't happen to him or her, and they may believe it
5 won't happen to them, but that doesn't mean they're not
6 aware of the risk.

7 Plaintiffs say smokers rationalize, but
8 again, you have to be aware of the risks to rationalize
9 about them. And that's the point. The smokers were
10 aware.

11 Now, you've heard the plaintiffs say: Well,
12 we didn't know about the 4,000 chemicals and we didn't
13 know about phenols and we didn't know about
14 nitrosamines, and that was hidden.

15 Well, it wasn't hidden. The government was
16 well aware of that information. The public health
17 authorities were well aware of that information. And
18 they said: We're not going to put out a label that
19 says: Watch out for phenols and nitrosamines. We're
20 going to put out a label that says: Smoking causes
21 cancer, smoking causes heart disease. Keep the message
22 simple.

23 Can any smoker seriously argue that their
24 awareness would have been materially changed, it would
25 have affected their decision-making process? They've

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1 been told smoking causes cancer. If we say to them:
2 By the way, there's nitrosamines in smoke, try to lower
3 them to the extent we can, still some in there, does
4 that change anything? The government certainly decided
5 it did not. And the warnings that it provided are
6 adequate as a matter of law.

7 When smokers know the risk of serious disease
8 and premature death, they can't argue that scientific
9 facts that are known by scientists would have made a
10 difference to them, because it would not, and there's
11 no evidence it would.

12 Now, not only are smokers aware of the risk,
13 but Dr. Boyse testified that they're so aware of them,
14 they overestimate them. And let me show you her
15 testimony on April 30th, 1999. That's when Dr. Boyse
16 began her testimony. If you look at 448.

17 But I think the most important thing here --
18 this is Dr. Boyse -- is that we know perfectly well
19 that smokers overestimate risks anyway, of their risk
20 of developing diseases like lung cancer.

21 And we also know from studies of risk
22 analysis that if people are confronted with opposing
23 views or conflicting evidence, on any issue, whether it
24 be smoke or anything else, they tend to take the worst
25 case scenario.

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1 So we have the following combination: You
2 have huge information available, you have the smokers
3 aware of the risks. There's not anything more that we
4 can tell them, and yet they overestimate the risks.
5 They overestimate the risks.

6 And that ends the attack on defendants'
7 statements. Defendants' statements can't be said to be
8 material, have affected anybody's decision-making,
9 because smokers are aware of the risks and indeed
10 overestimate the risks.

11 Now, Dr. Boyse testified in this case on
12 causation, and you remember yesterday, I guess it was
13 Tuesday, that Mr. Rosenblatt referred to her testimony
14 as an explosion. Well, what he heard exploding was his
15 mistaken view that there's a party line; that all
16 company scientists are required to say exactly the same
17 thing and they can't have a different view; the
18 companies would never tolerate anyone who made a
19 judgment that smoking causes lung cancer, for example.

20 The companies believe that causation is a
21 question of reasonable judgment. There's room for
22 stating different opinions. Science is not based on a
23 show of hands. And every scientist is not required to
24 say the same thing.

25 And in fact, while Mr. Rosenblatt was talking

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1 to you about the party line, he read you Dr. Boyse's
2 testimony, which I'm going to read you in a moment. He
3 referred to Dr. McAllister's statement, which
4 Dr. McAllister said: I would agree that smoking is one
5 of the contributing factors in a significant percentage
6 of cancer deaths.

7 Dr. McAllister said what he believed, not
8 words that were given to him. No party line.

9 And you heard all of the witnesses from the
10 plaintiffs come in here. They gave various opinions.
11 They were consistent. Was that a party line? No.
12 They told us that's what they believed, that was their
13 scientific opinion. We're not going to sue them for
14 fraud. Now, it cannot be fraud to state your opinions,
15 to express your opinions.

16 Now, Dr. Boyse, ladies and gentlemen, you
17 remember Mr. Rosenblatt didn't bring Dr. Boyse here;
18 Brown & Williamson and American did. And
19 Mr. Rosenblatt read you her views yesterday.

20 Let me put up the part of the quote that he
21 read, 789. Question, from Mr. Rosenblatt: You agree
22 that the evidence, the scientific evidence, is
23 sufficient to conclude that cigarette smoking causes
24 lung cancer?

25 Answer: I believe it does. I believe it

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1 does.

2 She couldn't have expressed her opinion any
3 clearer. Was she told what to say?

4 Give me 450.

5 While you've been at BATCO, 1986 to 1994, and
6 while you've been at B&W from 1996 forward, have you at
7 all times been free to express your opinion and your
8 belief about what you believe on the issue about
9 whether it's been established that smoking causes lung
10 cancer?

11 Yes, totally free.

12 Have you been free to exercise your opinions
13 and beliefs even though other scientists at the
14 company, at the company itself, may at times disagree?

15 Yes. Absolutely.

16 And what did she say about party line? 451.

17 When I joined BATCO in 1986, I was never
18 given a party line, I was never given a company
19 position statement, and I never have been, in the 13
20 years that I've been working in this area. What I was
21 asked is what my opinion was, and what I believe the
22 scientific evidence was, and my colleagues, too.

23 And she came here and she gave her opinion in
24 that witness chair; and what came through in her
25 testimony is that the issue of whether one is prepared

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1 to say that it's been established that smoking causes
2 lung cancer is a question of judgment, a question of
3 opinion where the evidence has evolved over time.

4 And scientists are free to disagree.

5 And in Dr. Boyse's opinion it does. It's
6 totally different from what the plaintiffs alleged,
7 that the defendants were required to renounce all
8 opinions and pledge allegiance to one view, plaintiffs'
9 view.

10 Now, the bottom line on this issue of
11 causation, ladies and gentlemen, is that the companies
12 were not waiting for the outcome of this causation
13 issue to take action. As you heard Mr. Reid for RJR,
14 Brown & Williamson, American, the working hypothesis
15 was that smoking causes disease and that we should do
16 things to try to lower the risk, try to make lower
17 delivery products.

18 The plaintiffs have set up this false
19 dichotomy, saying we remained in business based on the
20 belief that smoking does not cause disease. Totally to
21 the contrary. The government has said smoking does
22 cause disease. The packages are labeled and the
23 companies have assumed it causes disease, and tried
24 everything it can to lower the risk.

25 The companies have stayed in business, not

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1 because they don't believe smoking causes disease, but
2 because millions of people find smoking pleasurable.
3 They know of the risk, and our responsibility is to try
4 to provide them with a product and try to make less
5 hazardous products available, and work on that every
6 day. And that is what is being done.

7 Now, the second thing about causation is
8 this. You know, we rarely agreed on anything in this
9 case, but we agree on one thing, and the plaintiffs
10 have said the mechanism by which anything in smoke
11 causes disease is unknown. But he says that's not the
12 critical thing.

13 Well, it's very critical to the tobacco
14 company, very critical to Brown & Williamson and
15 American, and the reason why -- PM and RJR and all the
16 other defendants -- and the reason why is if we can
17 find the mechanism, number one, we can prevent disease;
18 number two, we can cure disease; and number three,
19 ultimately we may be able to make a cigarette that we
20 can say is safe, which we can't say and haven't said,
21 and the government will say is safe.

22 And that's precisely why CTR and the
23 companies have been conducting research to find a
24 mechanism. That's why. We haven't been waiting to
25 change our products, waiting on the mechanism. We've

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1 been searching for it so we can make further changes.

2 You heard Mr. F senblatt refer to Brown &
3 Williamson's CEO, Mr. Br es, and he said Mr. Brookes
4 said he would stay in the cigarette business even if it
5 was shown how smoking causes cancer.

6 But what he left out was Mr. Brookes said, if
7 you would show how smoking causes cancer, if you could
8 show what Dr. Carchman called the "what," then we could
9 make a cigarette that's safer, then we can cure and
10 prevent disease, then we would know how to change our
11 product. Yes, we would stay in business. We'd be
12 selling a safer product.

13 In the meantime, every American has the right
14 to smoke. That's what our government policy is, that
15 is what has been decided, and the risks are known.

16 And Dr. Boyse made it very clear that smokers
17 are aware of the risk when she gave this answer in
18 response to Mr. Rosenblatt's question.

19 460.

20 I think people choose to smoke for whatever
21 reason they may give you, and they give as many reasons
22 as there are smokers: They enjoy it, it helps them
23 relax, whatever it may be. The reasons why people
24 continue to smoke, they do so in full awareness of the
25 risk. In fact, the studies show that they

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1 overestimate the risk, and yet they continue to choose
2 to do it.

3 Now, you may not understand that, and I may
4 not understand that, and I might not choose to take
5 that risk and you may not choose to take that risk, but
6 people do so.

7 Now, ladies and gentlemen, let me see if in
8 the next 5 or 10 minutes or so I can bring my remarks
9 to a close. I really do appreciate you listening to me
10 for this long, at this point in the case. I think it's
11 imperative to address what this case is not about and
12 what you're not being asked to decide.

13 I think we all know that the case is not
14 about Abraham Lincoln and John F. Kennedy and Robert F.
15 Kennedy, and you're not being asked to decide whether
16 people should be allowed to smoke, or whether the sale
17 of cigarettes should be legal, or whether they should
18 be banned. Those are political issues.

19 You heard Mr. Rosenblatt say that the
20 companies must stop selling cigarettes because some
21 smokers develop lung cancer, and he argues we must get
22 out of business. He wants to make that decision for
23 everybody. But that's not his decision to make. The
24 government has made a different decision.

25 And on the topic of a business generally, you

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1 heard plaintiffs' counsel accuse the defendants of
2 being interested only in business, only in profits, and
3 only in money.

4 Well, ladies and gentlemen, first of all,
5 it's the plaintiffs in this case who are seeking money.

6 MR. ROSENBLATT: Your Honor, this case was
7 filed --

8 THE COURT: Sustain the objection.

9 MR. SCHNEIDER: Well, it is telling, ladies
10 and gentlemen, that after two days of argument, when
11 the plaintiffs told you what they thought the important
12 question was, they pointed, they pointed to the
13 punitive damage question at the end of the verdict
14 form.

15 Now, ladies and gentlemen, the plaintiffs say
16 the interest of the companies and the interest of our
17 customers are diametrically opposed, but that's wrong.
18 Our customers have an interest in finding less
19 hazardous products, and we have that same interest.

20 If we can find a cigarette that is, in fact,
21 safe, it's good for business, it's good for consumers.
22 If you can find an acceptable safer alternative -- and
23 nobody has suggested one. Nobody has suggested a
24 single idea, other than what we have pursued. Nobody
25 in the company or out of the company, nobody in the

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1 witness chair, or out of the witness chair. We have
2 tried everything.

3 Now, the plaintiffs in this case yesterday --
4 Monday, referred to Dr. Cummings' testimony and said
5 that it costs 5 cents to make a pack of cigarettes, and
6 suggested that the tobacco companies make huge amounts
7 of money on every package of cigarettes. That's
8 hogwash. It's totally unsupported in the record.

9 But what is in the record, you can look at
10 Plaintiffs' Exhibit 227, 87 percent of the price of
11 cigarettes in 1974, for example, was made up of taxes.

12 MR. ROSENBLATT: Objection, Your Honor.

13 MR. SCHNEIDER: This is in the record, Your
14 Honor.

15 THE COURT: I think we went through that once
16 before. I'll sustain the objection.

17 MR. SCHNEIDER: Yesterday or Monday,
18 Mr. Rosenblatt stood before you and argued that the
19 government was fooled; we fooled the government into
20 allowing smoking; we fooled governments into lifting
21 the ban.

22 But the truth is, ladies and gentlemen, the
23 government allowed smokers to have the right to smoke,
24 required warning labels, taxes the product very
25 heavily, and lets each American decide whether to smoke

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1 or not.

2 And again, you're not being asked to decide
3 whether the manufacturing of cigarettes should continue
4 as a legal business. That's already been determined by
5 our government.

6 And in short, ladies and gentlemen, this is
7 not a case about political correctness, it's not a case
8 about government policy, not about whether you like or
9 don't like cigarette companies. The case is about
10 whether or not the plaintiffs have proven the elements
11 of their legal claims set forth on the verdict form.

12 806.

13 Mr. Rosenblatt showed you the verdict form
14 yesterday, and I wanted to just speak about it briefly.
15 There are 10 questions on the verdict form. They
16 really break down into two separate groups. Keep this
17 in mind.

18 The first group consists of the first two
19 questions. It asks you about causation of disease, and
20 the second question asks you about addiction. And all
21 the rest of the questions on the form, the other eight
22 questions, are the second group. They're entirely
23 separate and they address whether plaintiffs have
24 proven their actual legal claims against the
25 defendants.

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1 And these two groups of questions are
2 separate questions. And it's not the case, as
3 plaintiffs may argue to you, that you should answer
4 Questions 1 and 2 yes, and if you do, that determines
5 how you should answer all the other questions, because
6 that's wrong.

7 Take Question Number 1. It asks you whether
8 smoking causes various diseases. Now, there are
9 diseases on this form like cervical cancer, and on the
10 next page you see kidney cancer and other diseases,
11 where there is insufficient evidence in the record to
12 support a finding that that disease is caused by
13 smoking.

14 But there are other diseases on the verdict
15 form. Go to the next page. Lung cancer. You see
16 there's various types. Squamous cell carcinoma, you
17 have heard a large amount of evidence on that disease
18 in this case.

19 And we acknowledge that people have
20 reasonable differences of opinions, and reasonable
21 people can come to the conclusion that smoking causes
22 squamous cell lung cancer. That's what their opinion
23 is.

24 If you reach that opinion, then you'll check
25 that disease yes.

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1 But that doesn't decide the legal claims
2 against the defendants. That's covered in the last 8
3 questions on the verdict form.

4 The same holds true with respect to Question
5 Number 2. It asks you about addiction. The Court is
6 not going to define the term "addiction" for you. We
7 believe that the 1964 Surgeon General's scientific
8 definition is a reasonable one, and that smoking cannot
9 reasonably be compared to heroin and cocaine.

10 But we recognize that many people adopt a
11 broader, more common usage of the term "addiction."
12 And if you adopt such a definition, then you'll check
13 that question yes.

14 But then again, that does not decide the
15 legal questions, the elements of the legal claims, that
16 are on the last 8 questions on the form. And those
17 questions, the last 8 questions, they don't turn on
18 whether smoking causes disease or is addictive.

19 Instead, they turn on smokers' awareness of the risks;
20 they turn on whether anything defendants did ever
21 prevented any smokers from being aware of the risks;
22 they turn on the efforts of these companies over time
23 to pursue a less hazardous cigarette. And it's these
24 claims that form the basis of plaintiffs' actual legal
25 claims for money damages in this case.

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1 It's the decision of those claims, the last 8
2 questions on the form, that determines whether
3 plaintiffs have proven their claims in this phase and
4 whether this case ends now.

5 Now, the questions on the verdict form will
6 have various instructions for you to follow. You've
7 heard references to the instructions, and one of the
8 instructions that you receive, I want to give you a
9 portion of an instruction.

10 It's 773.

11 This is a portion of the Court's negligence
12 charge: There is no duty on the part of a manufacturer
13 to warn of a risk or danger that should be obvious to
14 or generally known by foreseeable product users, or
15 danger of which the plaintiffs are already aware. When
16 a risk is obvious or generally known, the consumer will
17 or should know of its existence. A manufacturer in
18 deciding whether to warn can reasonably take into
19 account whether ordinary consumers are already aware of
20 the risks.

21 Ladies and gentlemen, the evidence in this
22 case show smokers are aware, shows that the defendants
23 did all that could be done; and that's why, on the last
24 8 questions on the form, the only permissible outcome
25 is to say no on each of those questions.

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1 And I want to, before closing, just talk
2 about two other particular claims on the form. I'll be
3 done in about five minutes. The first one is this
4 claim of intentional infliction of emotional distress.

5 You're going to have a charge on that
6 question, being asked whether the defendants have
7 engaged in extreme and outrageous conduct, intending,
8 intending to inflict emotional distress on smokers.

9 It goes beyond all -- the standard that the
10 Judge will instruct you on is the conduct has to go
11 beyond all possible bounds of decency and is regarded
12 as shocking, atrocious and utterly intolerable in a
13 civilized community.

14 This is a heavy, heavy, heavy standard of
15 proof that the plaintiffs didn't satisfy in this case.
16 In fact, I would submit to you, ladies and gentlemen,
17 that the claim is preposterous. It is preposterous to
18 claim that manufacturing cigarettes goes beyond all
19 possible bounds of decency and is regarded as shocking,
20 atrocious and utterly intolerable in a civilized
21 community.

22 Our civilized community is fully aware of the
23 risks of smoking, and has nonetheless determined that
24 cigarettes should be a legal product. Our civilized
25 community gives every person the right to smoke. Our

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1 civilized community here in Florida taxes each and
2 every package of cigarettes. Our civilized community
3 has passed laws for more than 30 years dictating what
4 the warning labels on cigarettes should say. It is
5 common knowledge in our civilized community that
6 smoking has health risks, and it can be difficult to
7 quit. And in light of all that, cigarettes are a legal
8 product and smokers have the right to smoke or not
9 smoke.

10 And can a plaintiff in 1999 seriously come
11 into this courtroom and suggest that manufacturing a
12 legal product is beyond all bounds of decency,
13 atrocious and utterly intolerable?

14 We've been trying to provide a product that
15 millions of people find pleasurable, that have risks,
16 that we are trying to get rid of, that we work at every
17 day.

18 I don't think that meets the burden at all.
19 Doesn't even come close.

20 Same is true for the punitive damage claim.
21 Just as they can't prove that heavy standard of extreme
22 and outrageous conduct, they can't prove the
23 defendants' conduct in this case, any defendant,
24 justifies finding an entitlement to punitive damages.

25 It would be unjust to award punitive damages

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1 against Brown & Williamson and American and the other
2 defendants with respect to a legal product, one that
3 they're trying to make safer products. They're
4 responding to the public health authorities.

5 It would be unjust to find for punitive
6 damages, find an entitlement on the theory that
7 information was hidden, that witnesses came here and
8 said information was hidden when it wasn't.

9 It would be unjust to assert punitive damages
10 on veiled claims of marketing to youth when Brown &
11 Williamson, for example, has a policy and has had a
12 policy for decades of marketing to 21 and older, even
13 though the legal age is way lower than that. It would
14 simply be unjust. It would simply be unjust.

15 There really are three things that matter in
16 this case after all of this evidence. Three things:
17 Smoking is pleasureable, but risky, and smokers have
18 known that; smoking can be difficult to quit, and
19 that's common knowledge as well; and number three, if
20 there's a way to make the cigarette risk free, we're at
21 work every day trying to find it. We want to find it.
22 Those are the three most important things.

23 If you keep those facts in mind when you're
24 dealing with the actual legal claims against the
25 defendants, I submit to you, ladies and gentlemen, you

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1 must answer no. This case has to end now.

2 Now, there's no doubt, ladies and gentlemen,
3 that throughout yesterday's long closing arguments the
4 plaintiffs made available and not so available efforts
5 to try to make you hate these defendants, try to make
6 us into monsters. Maybe if you hate us enough, you'll
7 ignore the evidence.

8 And there have been references in this case
9 to slavery and segregation and civil rights heros. You
10 can ask yourself, what are those rights?

11 MR. ROSENBLATT: You objected during every
12 one of those references. Every --

13 THE COURT: Counsel, please. You know that's
14 improper. Please, if you have an objection --

15 MR. ROSENBLATT: That's my objection.

16 THE COURT: I know.

17 MR. SCHNEIDER: Ladies and gentlemen --

18 THE COURT: Overrule the objection.

19 MR. SCHNEIDER: -- I'm confident that you're
20 not going to ignore the evidence in this case. I'm
21 confident that you're not going to characterize
22 thousands of employees at B&W and American, PM, RJR,
23 Lorillard and Liggett as monsters because they work at
24 making a controversial product that has known risk, and
25 everyone is aware of; and every research person in

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1 these companies is at work every day as we speak, is
2 trying to find the safe cigarette that people will
3 accept.

4 Now, each one of you gets to define justice.

5 It's your turn after so long. It's going to be your
6 job, not the media, not politicians, not talking heads
7 on television. It's going to be your job. And each
8 one of you, when you deliberate, will have to state
9 your views. You have to listen to your fellow jurors.

10 And you all will also have to have the
11 courage to stand up for your own convictions of what
12 you believe based on the evidence. Have the claims in
13 this case been proved against these defendants? They
14 have not.

15 The fundamental premise of our American
16 judicial system is that jurors who use their common
17 sense will listen to the evidence and will reach the
18 right result. And I have every confidence that you're
19 going to reach the right result in this case and return
20 a verdict on plaintiffs' legal claims in defendants'
21 favor.

22 I want to thank you again for your patience,
23 your endurance, your sense of humor, and most of all,
24 thank you on behalf of Brown & Williamson and American
25 and Mr. Moss for listening to me here today. Thank

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1 you.

2 THE COURT: All right. Mr. Heim, it's
3 quarter of 5:00.

4 MR. MOSS: Could we come sidebar?

5 MR. HEIM: In view of the fact that there's a
6 time issue here, I thought we could talk scheduling.

7 MR. ROSENBLATT: Scheduling doesn't have to
8 be on the record.

9 THE COURT: We'll be off the record. We'll
10 put it on the record later.

11 (Discussion off the record.)

12 THE COURT: Okay, folks. We've been trying
13 to work out scheduling. We would like to begin
14 tomorrow at 8:30 in the morning. Does anybody have a
15 problem with that? Great. Okay.

16 Depending, of course, on traffic, and I
17 understand there may be some traffic problems, but I'd
18 like you folks to be here, say, 8:15, 8:20. We'd like
19 to get under way about 8:30, give or take a few
20 minutes.

21 But we want to make up that hour, so let's
22 shoot for that, if you don't mind.

23 Same rules apply, don't watch T.V., don't
24 read the papers, don't make up your mind about
25 anything.

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1 (The jurors exited the courtroom.)

2 THE COURT: All right. Folks, have a seat,
3 please.

4 Now, Mr. Heim, you mentioned something the
5 other day about the definition of class. What you said
6 was accurate, or however you put it; I'm not really
7 sure. And I assume that you were talking about on
8 Page 1 of the instruction. I think that's about the
9 only place that it's really mentioned.

10 MR. HEIM: That's correct, Judge, the second
11 paragraph.

12 THE COURT: I looked at the definition that
13 was used in the amended complaint as to their
14 definition of the class. And it's just about right. I
15 mean, there's one word or two out of place, but other
16 than that. So what is the problem?

17 MR. HEIM: I think the definition of the
18 class that was approved by the Third DCA has in it, it
19 says diseases -- I'm not going to have it literally
20 correct -- diseases or medical conditions caused by
21 their addiction, or caused by their addiction to
22 cigarettes that contain nicotine. The addiction
23 concept is in the class definition.

24 THE COURT: It's not in the complaint
25 definition.

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1 MR. ROSS: It's in the order of certification
2 of the class.

3 THE COURT: That's where you're getting that
4 from?

5 MR. HEIM: From the order of certification of
6 the class.

7 MR. MOSS: Which is the class definition.

8 THE COURT: Let me take a look at it.

9 MR. ROSS: It was in the notice.

10 THE COURT: I know that, but what's in the
11 notice is a little bit different than what's in the
12 complaint. And we're here to prove the complaint.

13 MR. HEIM: If I may, this is the definition.

14 THE COURT: Okay. So basically "caused by."
15 The definition that's in the complaint is: Caused by
16 smoking cigarettes that contain nicotine.

17 What they have here is: Caused by their
18 addiction to cigarettes that contain nicotine.

19 So you're talking about "by their addiction."
20 Want to address that?

21 MR. ROSENBLATT: I know, Judge, that Susan
22 has been working on this anticipating, so she'll have
23 something to say in the morning. I know what our
24 bottom line is, that we prefer the definition of the
25 class as contained in the complaint.

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1 MR. MOSS: Can't be.

2 MS. LUTHER: Can't be.

3 MR. ROSENBLATT: Can be if the Judge says
4 that.

5 MS. LUTHER: Isn't the point that we've sent
6 that definition in the notice, so if we had a different
7 definition for the jury to determine, the notice is
8 completely invalid?

9 THE COURT: I'm going to have to look at the
10 Court order, which I don't have a copy in front of me.
11 If somebody would be kind enough to dig it up quickly
12 for me in the morning.

13 All right. We'll see if we can address that
14 issue in the morning.

15 MR. HEIM: Your Honor, tomorrow morning --

16 THE COURT: I don't want to waste a lot of
17 time on it. So we'll get here at 8:15.

18 MR. MOSS: We're here at 8:15, Your Honor.

19 THE COURT: I'll try at 8:15 so we can
20 discuss these things.

21 (Court was adjourned at 5:00 p.m.)

22

23

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